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REPORTS OF CASES

HEARD AND DETERMINED IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

MARCUS T. HUN, REPORTER.

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PREFACE.

THE hope of relieving the courts and the profession from the further continuance of the serious evils, existing in the present mode of reporting its decisions, has induced my acceptance of the office of Reporter for the Supreme Court.

On my appointment, in January, under chapter 99 of the Laws of 1869, I prepared and submitted to the justices, appointed to hold the General Terms of the Supreme Court in the several departments, and to the Bar Association of New York City, a bill, by the provisions of which, the power to appoint a reporter of that court was given to its justices. This bill was presented to the legislature, accompanied by letters from the justices of every department in the State, and by the certificate of the Hon William M. Evarts and others, representing the Bar Association of New York City, approving of its provisions and asking for its passage.

Believing that an act which the legislature was required by the Constitution to pass,* and which was called for by the concurrent voice of both the court and the profession, could not fail to become a law, I hesitated to commence the publication of a series of reports, as my term of office would cease on its passage. The influence of gentlemen, now engaged in the publication of unauthorized reports of the decisions of the Supreme Court, was successfully used to defeat this legislation, after the bill had passed the Senate and had been reported by the Judiciary Committee of the House. As for the present, at least, it is impossible to give to the court the appointment of its reporter, I have

* Const., § 23, art. VI.

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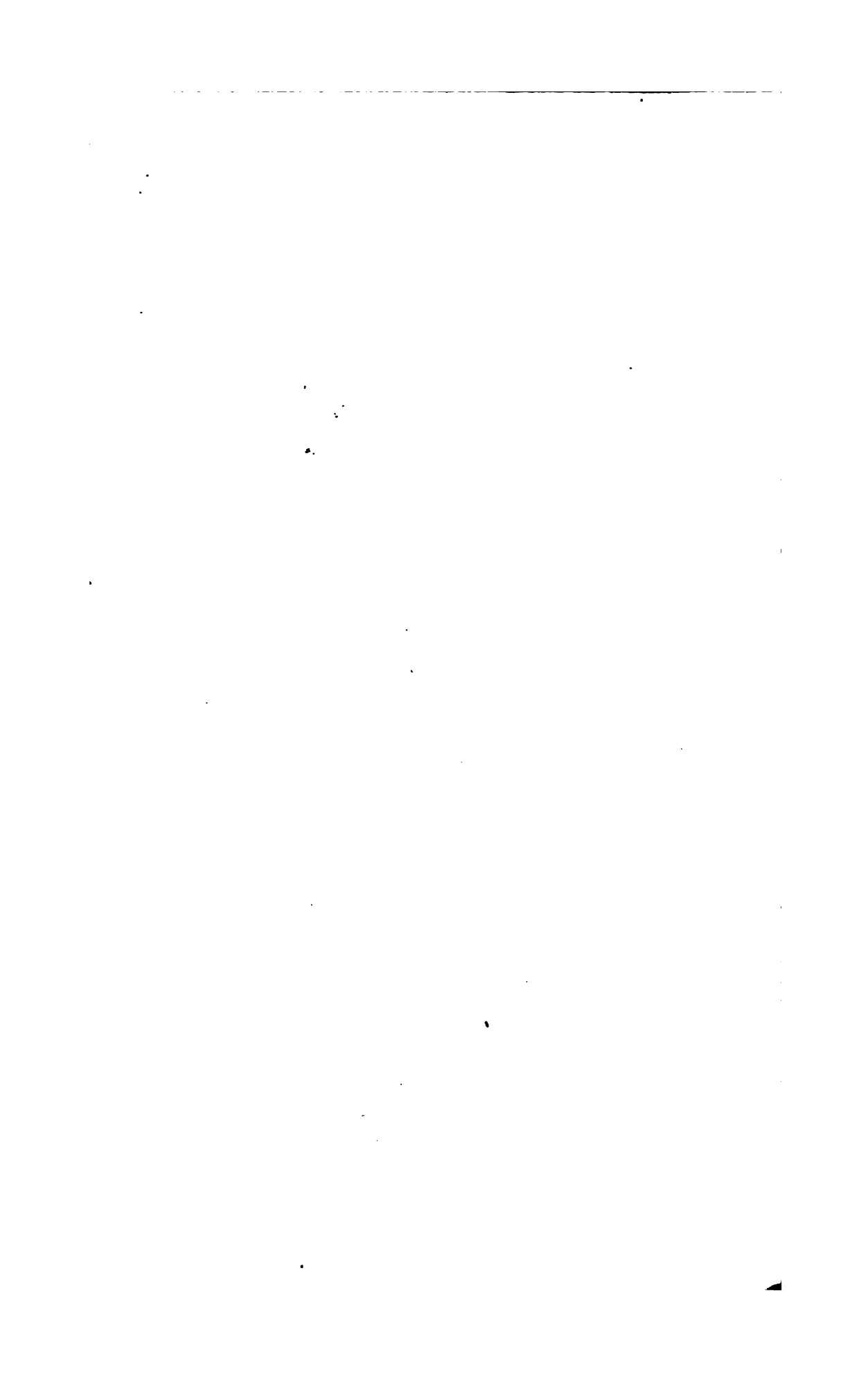
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ORDER

Made and entered at the

GENERAL TERM IN THE FIRST DEPARTMENT.....*January, 1874.*

GENERAL TERM IN THE THIRD DEPARTMENT.....*June, 1874.*

IN THE MATTER OF THE CASES
AND POINTS FOR THE STATE
REPORTER.

Ordered, That hereafter, in all cases brought on for argument in this department, there shall be furnished by the respective parties, in addition to the papers now required to be furnished to the court, one copy of the case and one copy of the points of counsel on each side to the clerk of the court, who shall, immediately upon adjournment of the court, transmit the same to the reporter appointed, pursuant to law, to report the decisions of the Supreme Court of this State.

ORDER

Made and entered at the

GENERAL TERM IN THE SECOND DEPARTMENT....*September, 1874.*

IN THE MATTER OF FURNISHING
CASES AND POINTS FOR THE
STATE REPORTER.

It is Ordered, That hereafter, in all cases brought on for argument before the General Term in this department, there shall be furnished to the clerk, by the respective parties, in addition to the papers now required, one copy of the case and one copy of the points of counsel on each side; and immediately upon the adjournment of the court, the clerk shall transmit the cases and points so furnished, to the reporter appointed pursuant to law to report the decisions of the Supreme Court of the State of New York.

Cases

DETERMINED IN THE

FIRST DEPARTMENT

AT

GENERAL TERM,

March, 1874.

Five Cases.

THE PEOPLE *EX REL.* JOHN A. BAGLEY, APPELLANT, *v.*
ANDREW H. GREEN, COMPTROLLER, ETC., RESPONDENT.

Two Cases.

THE PEOPLE *EX REL.* JAMES S. HENNESSY, APPELLANT,
v. ANDREW H. GREEN, COMPTROLLER, ETC., RESPONDENT.

THE PEOPLE *EX REL.* CHARLES G. CORNELL, APPELLANT,
v. ANDREW H. GREEN, COMPTROLLER, ETC., RESPONDENT.

THE PEOPLE *EX REL.* WILLIAM WOOD, APPELLANT, *v.*
ANDREW H. GREEN, COMPTROLLER, ETC., RESPONDENT.

THE PEOPLE *EX REL.* GRATZ NATHAN, APPELLANT, *v.*
ANDREW H. GREEN, COMPTROLLER, ETC., RESPONDENT.

Mandamus.

Where the Special Term refuses to grant a peremptory mandamus, on the specific ground that the relators can maintain actions at law for the recovery of their demands, this court is not, by that determination, restricted to that reason, if any other is shown by the papers, justifying the denial of this particular remedy.

The remedy by mandamus is one of an exceptional character, appropriate only to that class of cases where a clear legal right may be made to appear, without any other adequate legal means to redress and maintain it.

Where the fact, upon which the right may depend, is controverted, it must first be tried and determined, before a peremptory mandamus can be issued, and that determination is to be made not upon conflicting affidavits, but upon an issue framed upon the alternative writ, and must be tried by a jury according to the course of the common law.

The affidavits of the relators, stated that they were informed and believed that a sufficient amount of money had been collected and paid over to the comptroller, and was then in his hands or under his control, applicable to the payments required to be made. The respondent, in his return, denied that he had collected and had then in his hands, from the assessments made, an amount sufficient to pay the claims made by the respective relators, or to pay on their respective claims any sum whatever, and alleged that, at the time the order to show cause was made, and also at the time of the making of his return, no money, collected from the assessments, was in his hands or under his control, but that claims then paid, that were payable out of the assessments, or for the payment of which the city was to be reimbursed out of the assessments, were at least equal to the whole amount collected. *Held*, that the existence of the funds, out of which the claims were to be paid, was not sufficiently proved.

By the provisions of the act, under which the various improvements involved in these applications were made, the commissioners were required to cause all such surveys, maps, profiles, plans and other things as they might judge necessary to be done, to be made and prepared for their use. *Held*, that for the services so performed, the statute does not secure to the person or persons performing them, the right to resort to the city itself, or the fund to be created by the commissioners' assessments, for compensation, nor have the commissioners power to invest the persons so employed by them, with such right.

The sole and exclusive remedy of the person so employed, is the presentation of his claim by the commissioners, as a portion of their expenditures, and its satisfaction by their disbursement of the amount received for that purpose. Whether even that remedy has not been lost by the taxation of the commissioners' bill, without including these claims at the same time, *quere*.

Although demands against corporate officers or corporations themselves, may, under certain circumstances, be enforced by mandamus, where an action for damages may also be maintained in favor of the claimants, it cannot be done where an action can be maintained for the recovery of money claimed to be due and owing.

The commissioners, appointed under the act of 1813, can, by virtue of the provisions of the said act, maintain an action against the city to recover for their services and expenses in opening, widening and extending the streets referred to in these applications, and their applications for writs of peremptory mandamus were, therefore, properly denied.

IN these cases, appeals have been taken by the respective relators from orders denying motions made by them for writs of peremptory mandamus to be directed to the respondent, as comptroller of the city of New York, requiring him to pay the relators certain sums

of money claimed to be due to them respectively for services performed in proceedings taken for the making of certain public improvements in the city of New York.

These proceedings were instituted and carried on for the purpose of laying out, locating and establishing a public park or place, known as Riverside Park, along the Hudson river, between Fifty ninth and One Hundred and Fifty-fifth streets; the widening and straightening Broadway, between Thirty-fourth and Fifty-ninth streets; the opening of Sixty-eighth street from the Fifth avenue to the East river; and for the extension of Madison avenue from One Hundred and Twenty-fourth street to the Harlem river, in the city of New York.

The claims of the relator, John A. Bagley, in the first five cases, are for the services rendered by him as engineer and surveyor, together with a number of skilled subordinates, in making the necessary surveys, drawings and maps, to be used in the proceedings taken, and in making the improvements designated.

And they amount in the aggregate to the sum of \$199,949.18.

The claims of the relators in the other five cases are for the costs, charges and expenses of the respective relators for services performed and expenditures made by them, as commissioners in the street proceedings for determining the value of property taken for such improvements, the assessments of the benefits produced thereby to other property, and the making of assessments to raise the funds required to defray the expenses of the same, amounting, in the aggregate, to the sum of \$44,250.

The amounts claimed by the relators were adjusted and allowed by the court, on the confirmation of the commissioners' reports, as proper compensation for the services and expenditures claimed to have been made by them.

But the writs applied for were denied for the reason that the relators' remedy was by action at law for the recovery of the amounts claimed to be due. And from that decision the appeals were taken.

T. C. T. Buckley, A. J. Vanderpoel, and Gratz Nathan in person, for the appellants.

Dexter A. Hawkins, for the respondent.

DANIELS, J. :

Although the Special Term, held at chambers, denied the motions made for the writs of peremptory mandamus on the specific ground mentioned in the orders, that the relators can maintain actions at law for the recovery of their demands, this court is not by that determination restricted to that reason, if any other is shown by the papers, justifying the denial of this particular remedy.

If any legal reason is disclosed by the papers used upon the motion and presented on the argument of these appeals, for withholding these writs, that will necessarily lead to an affirmance of the orders, whether it be the same as was assigned for the making of the orders or not. Before the writ of peremptory mandamus can be directed to issue, a proper case must be shown to warrant it.

If, for any reason, the facts relied upon in the application are insufficient to entitle the relator to that remedy, under the well-settled principles of law applicable to it, an order denying it will not only be proper, but, beyond that, it will be the only lawful disposition which can be made of the application.

The remedy by mandamus is one of an exceptional character, appropriate only to that class of cases where a clear legal right may be made to appear, without any other adequate legal means to redress and maintain it.

The ordinary mode of redressing grievances, supplied by the common law, is that of a legal action.

But where that remedy cannot be properly resorted to, and a clear legal right exists, requiring the performance of some specific act, then redress may be secured by mandamus; where the fact, upon which the right may depend, is controverted, it must first be tried and determined, before a peremptory mandamus can be issued.

And that determination is to be made not upon conflicting affidavits, but upon an issue framed upon the return to the alternative writ, to be tried by a jury according to the course of the common law.

In cases of the magnitude of those now presented, the peremptory writ should never be awarded upon affidavits, unless it be plainly made to appear that the public interests are not to be prejudiced or jeopardized by the proceeding.

Ample time in all such cases is required for the full and complete

investigation of the grounds on which the claims are predicated, in order that the justice, as well as propriety of payment, may be fully established. The interests of the public can be in no other mode adequately protected.

And the duty to be performed for that purpose is one which manifestly requires more time than is ordinarily afforded by the summary mode in which these applications were made.

Its effective and complete discharge is more consonant to the deliberative proceedings of a legal action, than the disposition of a special motion brought to a hearing on two, four or even eight days' notice.

The applications on which the orders appealed from were made, proceeded upon the theory that the claims presented were payable out of the fund provided for the ultimate satisfaction of the expenses of the improvements and of the proceedings taken for making them.

And it was stated in the affidavits made in their support, that the respondent had in his hands the necessary means for their payment derived from that source.

In all the cases except the claim of the relator Nathan, for the extension of Madison avenue, the respondent denied the allegations made on that subject in support of the applications.

The denials were that he had not collected, and had not in his hands, from the assessments made, an amount sufficient to pay the claims made by the respective relators, or to pay on their respective claims any sum whatever.

And this denial was followed by the allegation that at the time when the order to show cause was made, and also at the time of the making of his answer, no money, collected from the assessments, was in his hands, or under his control, but that claims then paid, that were payable out of the assessments, or for the payment of which the city was to be reimbursed out of the assessments, were at least equal to the whole amount collected.

These statements are objected to, as evasive and ambiguous, by the counsel for the relators.

But even if they are liable to that criticism, they fall very far short of admitting the existence of the only fund out of which the relators have applied for the payment of their claims.

And as long as no admission of the existence of such funds has been made on the part of the respondent, there was no direct evidence that it did exist in any of the cases, unless those of Nathan, and the claim made for opening Sixty-eighth street, constitute exceptions to that conclusion.

For the affidavits, made by the relators in support of the applications in the other eight cases, simply stated that they were informed and believed that a sufficient amount of money had been collected and paid over to the comptroller, and was then in his hands, or under his control, applicable to the payments required to be made.

This unsworn information, derived from some undisclosed source, very clearly failed to prove the existence of the fact on which the right to payment was rendered, in great part, dependent by these relators.

And even if the respondent's denial was indirect and inartistic, it did not supply a sufficient degree of probability to the information relied upon in support of the applications, to render it legal proof of the existence of the fact referred to.

The supplemental affidavits made by the relators did not relieve their cases of this defect, for they are made up entirely by way of information and belief, predicated upon statements and admissions, for which the respondent is not responsible, made by the deputy comptroller and the respondent's counsel.

But even though the relator, Nathan, stated, in positive terms, in his affidavit made for the purpose of supporting his application, that the respondent had collected and received, and then had in his hands, in the proceedings taken, more than sufficient to pay his claim, the statement was afterwards shown by his supplemental affidavit to be entirely without foundation, for he then swore that the collections had amounted to the sum of \$128,808.86, while the payments made for awards and expenses amounted to \$591,880, which created a deficiency in the fund amounting to \$363,071.14.

Instead of the comptroller's having a fund in his hands out of which this claim could be paid, as the relator, in the first place, stated he had, this second affidavit clearly showed that there was no reason for even suspecting its existence. But the denial of the existence of the funds proceeded against, on the part of the comptroller, is not liable to the charges made concerning it on the

part of the relators, for he distinctly and positively avers that he has not collected from the assessments, and has not in his hands, the amount required to pay the claim made, or any sum whatever, but, on the contrary, that the claims previously paid, which were payable out of the assessments, or for the payment of which the city was to be reimbursed out of the assessments, were, at least, equal to the whole amount collected.

This denial, followed by the statement and explanation afterward made, show that there was no such fund in the comptroller's hands as the relators, by their proceedings, were endeavoring to enforce payment from. And there was nothing whatever in the proof, supplied by the relators, from which the court could say that either was untrue. But, even if there had been, it would not have entitled the relators to their writs, because it would only show that such a controversy existed as the law required to be determined by a trial before a jury.

The claim made by the relator, Bagley, arising out of the proceedings taken to open Sixty-eighth street, is no better sustained by him than those already considered. For his statements of the existence of the fund, from which his demand of payment was made, are confined entirely to the unreliable source of simple information and belief, while the comptroller positively avers that preceding claims had been made against the fund, which were much more than sufficient to exhaust its amount.

Whether the relator could, in any view, establish his right to paramount payment over those other claims, was not made to appear, and as long as it was not, the court could not certainly determine that fact in his favor.

In neither case was it shown that the funds proceeded against, and solely out of which the relators demanded payment, had any existence.

On the other hand, the fact of their existence was explicitly denied in all the cases except that relating to the opening of Sixty-eighth street, where the fund was more than exhausted by preceding demands filed against it.*

But the relators claimed that the comptroller had the power of

*Baker v. Utica, 19 N. Y., 326.

creating the funds, out of which they required him to make payment, by the sale of city improvement stock, or assessment fund bonds. If he could do that, it would not sustain their applications for payment out of existing funds when it appeared that there were no such funds. Whether he could lawfully create such funds or not, was not shown as a ground for issuing writs of mandamus, requiring him to pay these claims out of funds then alleged to be in his hands, but as a reason why his denial of funds should be held to be unavailing.

Besides that, the applications were not for writs requiring him to sell such stock and bonds, but they were solely for writs to require him to pay out of particular funds, when it was shown that there were no such funds on hand.

The cases made by the relators were insufficiently sustained, as well as fully answered, and for both reasons their applications were properly denied.

It would have involved an inexcusable want of authority for the court to have directed payment of either of these claims under the circumstances shown, even if no other legal obstacle existed in their way.

By the provisions of the act under which the proceedings were taken for widening and straightening Broadway, for opening Sixty-eighth street, extending Madison avenue, and locating and laying out Riverside park, commissioners were required to be, and were in fact, appointed by this court, for the purpose of exercising the authority and discharging the duties required in the promotion and consummation of those improvements.

The object of their appointment was the performance of the duties prescribed by the act.

And among them were not only the duties of determining the land to be taken, and the apportionment of the damages and benefits resulting therefrom among the persons and upon the property affected, but beyond that, they were required to cause all such surveys, maps, profiles, plans and other things as they might judge necessary to be done, to be made and prepared for their use.*

The terms, as well as the general scope and spirit of this section

* 2 Revised Laws, 409-10, § 173.

and of those succeeding it, relating to such enterprises, exhibit it to have been the design of the legislature, in the enactment of the law, that the entire authority to be exercised in determining the land to be taken, the compensation to be made for it to the owners and others interested in it, and the persons and property benefited by the improvement, upon whom the expense should be assessed and by whom they should be ultimately borne, should be possessed and used by the commissioners appointed under its provisions by the court.

They constituted the tribunal in which all the powers, provided by the statute for the promotion of the object designed to be accomplished by the proceedings prescribed, became vested.

And it was, accordingly, by their authority and under their employment, that all surveys, maps, profiles and plans, deemed to be necessary, were prepared and made.

The persons making them necessarily did so, for them, by their engagement and under their direction.

They were subordinates and servants of the commissioners, so far as they acted in the accomplishment of those results.

The commissioners, through them, under the authority given by the statute, and pursuant to its terms, caused the surveys, maps and profiles to be made. That was the mode required to be pursued, and the affidavits of the relator, Bagley, on which his applications for writs of mandamus were made, show that it was, in fact, the course adopted by the commissioners.

For he states that he was employed and appointed by them as surveyor to the commissioners, and performed his duties under that employment, and those duties were performed in executing the authority conferred upon them.

For the services so performed, the statute does not secure to the person or persons performing them, the right to resort to the city itself, or the fund to be created by the commissioners' assessments, for compensation; neither does it confer upon the commissioners the power of investing the persons employed by them, for the purpose of making surveys, maps and profiles, with the right to proceed either against the city or fund for their remuneration.

If it did, as they are not restricted to the employment of any specific number of such persons, a multitude of suits, or proceedings

by way of mandamus, might be incidentally provided for, alike vexatious to the public authorities and detrimental to the public interests.

In the supplemental affidavit of this relator, the statement is made that his claims represent not only his own services, but also those of a number of skilled employes and experts in such matters. And if he can proceed as an independent claimant for compensation, no good reason exists for denying the same privilege to each of those persons. For as the statute has secured no such right as the result of the commissioners' employment, it must be maintained, if that can be done at all, on the simple circumstance that services have been performed for them and in pursuance of their authority.

That is as true in the case of each one of such employes and experts as it is in the case of the relator. If he can recover for his services by an independent proceeding, either by way of suit or mandamus, then the same right should be conceded to them, for their claims must be equally meritorious.

But that was not the design or intent of the act under which the proceedings were carried on. By that, the tribunal or body between the public and the work to be performed was the commissioners and they alone. The proceedings provided for, were to be, and were, carried on by them, and they were the only officials known either in their initiation, progress or consummation. What was done in the course of their proceedings, was done for them, under their direction, and in subordination to their authority. This is not only apparent from the section prescribing their powers and duties, but also from the specific direction requiring them to cause the surveys, maps and profiles to be made, required by them in the course of their proceedings. And it is further confirmed, in the most explicit manner, by the succeeding section of the act, which provides for the commissioners receiving, in addition to their own fees, all reasonable expenses for maps, surveys and plans.*

There is, therefore, not only no provision giving the person or persons who may make surveys, maps, plans and profiles, under the employment of the commissioners, the right to demand compensation from the city, either by suit or mandamus, but, on the other hand, the right to receive the compensation for such services is, by this section, expressly confined to the commissioners.

* 2 Revised Laws, 422, § 189.

While the act of 1815 has prescribed some changes, respecting some of the proceedings to be taken for opening parks and public squares, it has left the preceding law wholly unaffected in its provisions concerning this class of services.* Compensation for them are claims against the commissioners, who alone are empowered to receive the amount from the city, and disburse it among the subordinates employed by them. And to the same effect are Laws of 1862, chapter 483, section 5.

The proceedings are purely statutory, and that is the remedy prescribed by the terms of the law, by which the surveyor, and the persons connected with his employment, are to be remunerated for their services. And it is the only remedy afforded by the statute for such remuneration. And where that is the case, the rule is well settled that no other remedy than the one prescribed can be pursued.† The applications made by the relator Bagley were properly denied upon this ground. He was neither entitled to the writ of mandamus, nor to the maintenance of any other proceeding whatsoever, against the city nor any of its officers for the recovery of his remuneration.

His remedy is solely and exclusively that given by the statute, which contemplates and provides for the presentation of his claim by the commissioners as a portion of their expenditures, and its satisfaction by their disbursement of the amount received for that purpose.

Whether even that remedy has not been lost by the taxation of the commissioners' bills, without including those of the surveyor at the same time, it is not necessary now to decide.

The right of the commissioners to the writ of mandamus to enforce payment of their claims, arising out of the proceedings to straighten and widen Broadway, open Sixty-eighth street and extend Madison avenue, depends upon other provisions contained in the act of 1813, already referred to.

It is claimed in their behalf that the right exists, whether their claims are payable, under the terms of the act, directly out of the fund provided by the assessments or may be enforced as general liabilities against the city.

*Laws of 1815, 154, chap. 152.

† *Almy v. Harris*, 5 John., 175; *Stafford v. Ingersoll*, 3 Hill, 39; *Cook v. Kelley* 13 Abb., 85, 74; *Id.*, 466; *Dudlev v. Mayhew*, 3 Com., 9.

But even though demands against corporate officers or corporations themselves may, under certain circumstances, be enforced by mandamus, where an action for damages may also be maintained in favor of the claimants, the courts have not yet gone so far as to hold that it may be done where the action can be maintained for the recovery of money claimed to be due and owing. On the contrary, there it is held that the action for the recovery of the money or debt due is entirely adequate and complete for the party's redress, and he is accordingly confined to that remedy.*

The claims presented for payment by the commissioners are very much like those adjudicated in these authorities, and for the enforcement of which the writ of mandamus was denied. They are claims for the recovery of definite and specific sums of money, and for that reason the appropriate subjects of ordinary actions at law, unless payable exclusively out of the fund created by the assessments.

If demands due from the corporation could, as a general principle, be enforced by the writ of mandamus against one of its officers, there would be no need of a legal action for their recovery. The action would then become the exception, instead of the writ, as the latter is, at present, under well-settled principles of law.

Besides, if the claims are due from the city, as other debts owed by it are, that, of itself, would be a good reason for denying applications for their payment through the writ of mandamus against one of its officers. By the statute under which the commissioners proceeded, the assessments for benefits derived by adjacent and other property owners, from the improvements made, are rendered the final source from which all payments are to be received. The expenses, in the end, are all to be borne by persons owning or interested in the property benefited.†

But before the funds can be derived from that source, expenditures are required to be made to persons who may be divested of their property for the purpose of making the improvements, and also to pay expenses incident to the proceedings themselves.

* *People v. Mayor of New York*, 25 Wend., 630; *People v. Perry*, 25 Barb., 73; *People v. Supervisors of Chenango*, 1 Kern., 563; *People v. Supervisors of Fulton Co.*, 14 Barb., 52.

† 2 Revised Laws, 419, § 185.

Great injustice would often be produced by deferring their payment until the assessments could be collected.

Accordingly, the legislature did not render their payment dependent upon that contingency. The amounts which might become due for those objects were not, in the first instance, required to be paid out of the funds derived from the assessments.

But for the payment of awards for property taken, proceedings by way of actions against the mayor, &c., were provided, after the expiration of four months from the confirmation of the commissioners' report.* And, as to the fees and expenditures of the commissioners, an unqualified duty of payment was imposed upon the same body.†

It is claimed in behalf of the commissioners, that, as the law provides expressly for a remedy by action in favor of the owners of property taken for the purposes of the improvements, and omitted to do the same for the recovery of the fees and expenses of the commissioners, an action for the latter cannot be sustained. But that result does not and cannot follow from this omission, if enough can still be found in the act to warrant an action at law in their favor, without the aid of the other provision.

The point to be considered is whether, under the settled principles of law relating to this subject, sufficient has been provided to secure to them the right to maintain actions at law in which their expenses and compensation can be recovered. That there has, would seem to follow from the fact that no remedy against the fund to be produced by the assessments has, either expressly or by reasonable implication, been given them; and from the positive provision, made without qualification, that the compensation and reasonable expenses of the commissioners for maps, surveys, plans, clerk-hire and other necessary expenses and disbursements, should be paid by the mayor, aldermen and commonalty of the city of New York; that the amounts paid should be included in the assessments made upon persons benefited by the improvement, and that the city should be reimbursed from that source.‡

By section 185, the moneys paid for charges and expenses of the estimate, assessment and report that may be made, and all such other

*2 Revised Laws, 418, § 183.

‡2 Revised Laws, 419, 422, §§ 185, 189.

†Id., 422, § 189.

expenses, disbursements and charges as may properly attend the proceedings taken to open, enlarge, extend or otherwise improve streets, are to constitute a claim for this reimbursement.

This provision clearly contemplates their payment before the collection of the assessments, and payment, too, by the mayor, aldermen and commonalty, for that is the body to be reimbursed by the provision made.

In this respect it is in complete harmony with the succeeding provision, contained in the other section referred to. And that provides for the payment to be made by the city, and for including the amounts paid in the assessments. By these provisions, the duty of the city to pay is rendered complete, not out of the assessments, but generally, and after payment the amounts paid are to be reimbursed to it from the assessments.

It would be difficult to create such an obligation by clearer terms; no room appears to be left for doubt upon the subject. That such an obligation to pay may be enforced by action, and that an action is the appropriate mode of enforcing it, is well sustained by authority.

“If a new right is created by statute, and no remedy is prescribed for the party aggrieved by the violation of such right, the court, upon the principle of a liberal or comprehensive interpretation of the statute, will presume that it was the intention of the legislature to give to the party aggrieved a remedy, by a common-law action, for the violation of his statutory right, and he will be permitted to recover in an appropriate action founded upon the statute.”* This principle clearly includes the claims of the commissioners for their services and expenses in opening, extending and widening the streets referred to, and it is well sustained by other cases relating to the same subject.†

Writs of mandamus were, therefore, properly denied in these applications of the commissioners, on the ground mentioned in the orders appealed from.

It seems to have been supposed by the appellants' counsel that

* *Clark v. Brown*, 18 Wend., 213, 220.

† *Ewer v. Jones*, 6 Mod., 27; *Braithwaite v. Spinner*, 5 Mee. & Wells, 326, 327; *Dudley v. Mayhew*, 3 Com., 9, 15; *Stafford v. Mayor, etc*, 6 John., 1, 7; *Id.* 541.

cases were before the court in which commissioners' claims were made for proceedings to locate and lay out the Riverside park. That, however, proves to be a misapprehension, and for that reason it is unnecessary to consider the effect of the provisions of the act of 1815, concerning such improvements.

The orders appealed from are right, and they should be affirmed, with costs.

DAVIS, P. J. and DANIELS, J., concurred.

Orders affirmed, with costs.

HERMAN COPPERMAN, PLAINTIFF IN ERROR, v. THE
PEOPLE, ETC., DEFENDANTS IN ERROR.

Stolen goods—receiver of—indictment—former transactions between thief and receiver—evidence of.

On the trial of an indictment, charging the offense of receiving stolen goods, conversations, had between the accused and the thief on former occasions, when the accused had received from him goods similar to those described in the indictment, are admissible in evidence as tending to show guilty knowledge on the part of the receiver.

A charge of the judge, that it was material for the jury to determine whether the transaction was a sale or pledge, was correct; as, if it was the former, if the sum paid were very much less than the real value of the goods, it would be material on the question of notice.

WRIT of error to the Court of General Sessions of the Peace in and for the city and county of New York. The facts are stated in the opinion.

A. Oakley Hall, for plaintiff in error. The judge erred in admitting evidence of conversations relating to prior transactions. (*Coleman v. The People*, 1 N. Y. Sup. Ct. Rep., p. 3, addenda; *The People v. Rando*, 3 Parker Cr., 339.)

B. K. Phelps, for defendants in error. Evidence of prior transactions admissible on question of guilty knowledge. (*Reg. v Dunn*, 1 Moody, C. C., 146; *Wood v. U. S.*, 16 Peters' Sup. Ct.

R., 360; 3 Greenlf. Ev., § 15; Roscoe's Crim. Ev., 876; *Commonwealth v. Jenkins*, 76 Mass. (10 Gray), 485; *Reg v. Foster*, 29 Eng. L. and E., 548.)

DAVIS, P. J.:

The plaintiff in error was indicted for, and has been tried and convicted of, the offense of receiving stolen goods, knowing the same to have been stolen.

The offense, charged in the indictment, is alleged to have been committed on the 30th of June, 1871, in receiving two parcels of silk, of one pound each, the property of certain persons named (who composed the firm of R. Gardner & Co.), stolen from them by one James Robinson. Robinson was the principal witness on the part of the people. He was, at the time of the alleged offense, and for some years before, a clerk in the wholesale establishment of R. Gardner & Co. The theft of the silk, by Robinson, was both proved and admitted. He testified that on the 30th of June, 1871, he took the silk from the store of his employers and carried it to the plaintiff's shop and sold it to him for six dollars. The value of the silk was shown to be \$17.50.

Robinson also testified that he had, on ten or twelve occasions within a year, before the transaction charged in the indictment, taken from his employers goods of the same or similar kinds, and pawned or sold them to the plaintiff. That on the first two occasions he pawned the goods, taking tickets for the same, which he afterwards sold to plaintiff, and, on all the other occasions, he sold the goods to him for sums much less than their real value.

The plaintiff in error was a licensed pawnbroker, and it was claimed and testified to in substance by him (and other testimony was given tending to establish) that he had received the goods in pawn in the course of his business, loaning upon them the sums stated by Robinson to have been paid. But three questions are made on the part of the plaintiff in error. First. That the court erred in admitting conversations which related to such transactions as were had at a time prior to the one embraced in the indictment; second, that the court erred in charging the jury that it was material for them to consider whether the indicted act was a pawn or sale; and third, that the judge erred in not directing an acquittal

upon the evidence. No point is made upon any informality in the record. To constitute the crimes two facts were necessary to be established :

First. That the goods had been stolen.

Second. That the receiver knew at the time of receiving them that they had been stolen.

The first of these facts was conceded, and it was also clearly shown, and not disputed, that the plaintiff in error received the goods from the person who had stolen them. The character of the act of receiving them, and whether that act was accompanied with the guilty knowledge required by the statute, were the controverted facts of the trial.

It was sought on the part of the people to show, as tending to prove the guilty knowledge, that, before the particular act charged, there had been a series of similar transactions between the same persons, in which the plaintiff in error had received from Robinson goods similar to those described in the indictment and which the latter had stolen from Gardner & Co. The fact of the transactions was not objected to ; but the conversations had between the accused and Robinson at the time of such transactions were objected to and admitted under exception.

We think the court committed no error in admitting such conversations. The competency of such evidence was affirmed in *Regina v. Dunn*,* and we are aware of no case which conflicts with that decision.

The evidence offered and received in this case did not go outside of transactions between the accused and Robinson. It related to goods stolen by him and directly delivered to the accused. The goods were similar in kind, and were received in each case under like circumstances. The transactions were some ten or twelve in number, and, if Robinson were believed, they were, except the first two, sold at prices much below their actual value. Robinson was a clerk in a store, engaged in stealing from his employers from time to time and carrying the stolen goods to the plaintiff's shop. Now, while the precise point of inquiry for the jury, was whether the plaintiff knew, when he took the packages in question, that Robin-

*1 Moody C. C., 146.

son had stolen them, yet the mode of proving such knowledge was not restricted to what transpired at the time of the very act charged in the indictment. It would clearly have been competent to have proved that, before receiving the silk in question, the plaintiff in error had stated that he knew Robinson was stealing goods from his employers and bringing them to him, and from such an admission a jury might find that he knew the silk, received on the last occasion, had also been stolen.

So it was competent, in connection with the transactions themselves, to show conversations between the parties which tend to establish knowledge of their real character, and it is for a jury to say whether they go far enough to show that the receiver knew the nature of Robinson's acts, both in those and in the last transaction.

It is for the jury to judge whether the previous conversations show an understanding with the thief or a knowledge of his crime, and conversations having a tendency to show either of those things are properly admissible, especially when accompanied with acts of dealing which they tend to characterize. The idea that each conversation, in order to be competent, must "prove that the thief communicated his crime, or that the receiver admitted his knowledge of the crime," cannot be sound, because such a rule would take from a jury its peculiar province of determining the meaning of the language used by the parties, their intention in using it and the inferences justly to be drawn from it.

It is enough that the conversation tends to prove, under any fair construction a jury may give to it, the guilty knowledge necessary to be found.

This, we think, is the rule deducible from all the authorities,* and we think there was no departure from this rule on the trial.

The objection to the charge is not well founded. It became quite material for the jury to determine whether the transaction, charged in the indictment, was a sale, or a pawn to secure a loan. Robinson testified that it was a sale; the plaintiff in error, that it was a pawn.

The price paid, if a sale, being much less than value, was a cir-

*2 Russ. on Crimes, 776 (3d ed.); 3 Greenl. E., § 15; 16 Peters, 860; Roscoe Crim. E., 876; Commonwealth v. Jenkins, 76 Mass. (10 Gray), 485; Reg. v. Foster 20 Eng. L. and Eq., 548.

cumstance to be considered by the jury ; but if a pawn to secure a loan, the amount loaned was not material as bearing on the question of notice.

Besides, as the court charged, in substance, that if Robinson had testified falsely in any material point, he was to be disbelieved in all respects, and it was with reference to the conflict between his and the plaintiff's evidence as to the character of the transactions, that the charge called the special attention of the jury to that subject, and in that regard it was very favorable to the plaintiff in error.

In respect to the third point, it need only be said that there was a conflict of evidence quite too great to have justified a direction of acquittal.

The court submitted every question with entire fairness to the jury, and the case was one peculiarly within their province.

If the case could be disposed of on the merits, the judgment should be affirmed ; but for reasons assigned in the opinion of DANIELS, J., in *Hildebrand v. The People*, decided at the present term, the proper course is to dismiss the writ.

DONOHUE and DANIELS, JJ., concurred.

Writ dismissed. The record was afterwards amended by consent of the district attorney, and the judgment was affirmed.

DEIDERICK HILDERBRAND, PLAINTIFF IN ERROR, v. THE
PEOPLE OF THE STATE OF NEW YORK, DEFENDANTS
IN ERROR.

Larceny—clerk's entry of judgment—what should contain.

A treasury note of the denomination of fifty dollars was handed to the plaintiff in error to take ten cents out of it, for the payment of a glass of soda-water ; he appropriated the entire amount of the note to his own use ; *held*, that upon proof of these facts he could be convicted of larceny.

The return stated that the prisoner appeared in his own proper person and was in due form of law tried and convicted ; *held*, that as it nowhere stated that he left the court after he so appeared, the presumption is that he remained and was present during the whole of the trial.

The clerk's entry of the judgment pronounced, is not required to state what succeeded the verdict and preceded the sentence, and it need not appear from it

that the prisoner was asked, before sentence, whether he had anything to say why the sentence should not be pronounced upon him for the offense of which he had been convicted.

To review the conviction and judgment in criminal cases, requires a formal judgment record to be made, signed and filed, and if that is not shown by the return to have been done, the court has nothing before it on which the case can be properly considered.

When a record shall be made, signed and filed as the statute prescribes, and it shall not appear from it, that this inquiry was made of the defendant before he was sentenced, then it may be necessary, for that reason, to reverse the *judgment* pronounced, but not the conviction.

WRIT of error to the Court of General Sessions of the city of New York, to review the judgment of that court entered upon the conviction of the plaintiff in error of the crime of grand larceny. The facts appear in the opinion. The court charged the jury that if they were satisfied that the complainant handed to the prisoner a fifty-dollar bill, for him to change and take ten cents out of it, and return to him the balance of the fifty dollars; and if, when the bill was so delivered to the prisoner, he understood that the bill had been so handed to him for the sole and only purpose of having it changed, and taking out ten cents, and delivering the balance of the money to the complainant, and that, when the prisoner took the bill, he intended to convert the balance, over and above the ten cents, to his own use, they should convict the prisoner of grand larceny.

Wm. F. Kintzing, for the plaintiff in error.

B. K. Phelps, District Attorney, for defendants in error.

DANIELS, J.:

The plaintiff in error was convicted of the crime of grand larceny, upon evidence showing that a treasury note of the denomination of fifty dollars, was handed to him to take ten cents out of it for the payment of a glass of soda water. Instead of doing that, he appropriated the entire note to his own use, and the court charged the jury that they could convict of larceny upon this proof.

An exception was taken to that portion of the charge, which in effect was the only exception in the case; for those previously taken, simply presented the same point in a different form.

That the plaintiff in error could properly be convicted of larceny on proof of those facts, is a proposition which the authorities have settled against the prisoner.* It is also urged, in the prisoner's behalf, that it does not appear that he was present during the trial. The return states that he appeared in his own proper person, and was in due form of law tried and convicted. As it is nowhere stated that he left the court after he so appeared, the presumption is that he did remain and was present during the whole of the trial; certainly, no presumption to the contrary can be entertained, as long as nothing appears to support such an inference.†

The remaining objection, taken in behalf of the prisoner, is made upon the omission of the return to show that he was inquired of, before sentence, whether he had anything to say why the sentence should not be pronounced upon him for the offense of which he had been convicted by the jury.

From the return made to the writ of error, it cannot be determined whether this requirement of the common law was observed in this case or not. No record of the proceedings is contained in the case, showing what did transpire between the conviction and sentence. All that has been brought before the court by the writ of error, after the verdict, is the clerk's entry of the judgment pronounced. That entry is not required to state what succeeded the verdict and preceded the sentence, and if made as it is required to be, could not show whether this inquiry was made or not. What the entry is to contain, is prescribed by the statute of the State. It is required to contain a brief statement of the offense for which the conviction shall have been had, abridged to such an extent from the indictment as to be sufficient to maintain the averments relating to it, necessary to be made in an indictment against the same person for a second offense, with the judgment pronounced upon the conviction.‡ Nothing but the conviction, with the description of the offense for which it may have been had, is required to precede the entry of the judgment pronounced, while the inquiry mentioned must follow the conviction and precede the judgment.

* *People v. Call*, 1 Denio, 120; *People v. McDonald*, 43 N. Y., 61; *Reg. v. McKale*, 11 Cox C. C., 32.

† *Stephens v. People*, 19 N. Y., 549. ‡ 3 R. S., 5th ed., 1031, 1032, §§ 5 and 8.

And it is just what the statute has nowhere required to be entered by the clerk in his minutes; consequently, it is a circumstance which, in the ordinary course of the proceedings prescribed by the statute, could not properly appear by the entries required to be made by the clerk in his minutes.

If the judgments pronounced in criminal cases, are to be reversed for the reason that a return, like the present one, does not show whether this inquiry was made or not, very few criminal judgments can be maintained, even though, in all of them, the most scrupulous care may have been taken, to conform strictly to this requirement of the common law.

The purposes for which the clerk is required to make the entries in his minutes, are mentioned in the statute, and that of returning them as the record in the case, in answer to a writ of error, is not among them. These purposes are to enable the clerk to transmit a proper statement of criminal convictions and judgments to the secretary of state, to supply the sheriff with a proper transcript to convey the convict to prison, and to constitute evidence of the conviction and sentence where no record of the judgment has been signed and filed;* while the judgment, the writ of error issues to review, is that which is rendered upon the indictment—the complete judgment in the case. This is evident from the circumstance that the prisoner is given the right to require the district attorney to make up a record of the judgment, and in case he fails for ten days afterward to do so, the defendant himself may cause the same to be made up, signed and filed.† There would be neither necessity for, nor propriety in such a provision, if the judgment could be reviewed on the clerk's entries. And no other object can have been designed to have been subserved by its enactment, than to place the proceedings in such a form as would enable the defendant to have them reviewed by writ of error. That the entries of the clerk are not designed to be such a record, is further evident from the section providing when the minutes may be used as evidence; for, by the express terms used, that can only be done in cases where no record of the judgment has been signed and filed.‡

* 3 R. S., 5th ed., 1032, 1033, §§ 7, 12, 13, 14.

† 3 R. S., 5th ed., 1031, § 4.

‡ 3 R. S., 5th ed., 1032, § 12.

The bill of exceptions provided for, also, is to be returned upon writ of error, as authorized at the time of the enactment of the statute, in personal actions. * And that could only be done at that time, in those actions where a formal judgment record had been made, signed and filed.

The entire mode of proceedings, prescribed for reviewing the conviction and judgment in criminal cases, requires a formal judgment record to be made, signed and filed; and if that is not shown by the return to have been done, the court has nothing before it on which the case can be properly considered. To allow the practice, adopted in the present instance, to be substituted for that devised by statute, would be dangerous in the extreme. Certainly a large majority of the felons in the State prisons of the State would be set at liberty under it, if the clerk omitted from his minutes, what the law does not require to be entered in them, a statement of the circumstance that the defendant was asked whether he had anything to say why sentence should not be pronounced upon him, and that, too, when in all the cases, the inquiry may, in fact, have been made.

In the absence of a record, the court has nothing before it, on which it can say whether the objection now under consideration, is well founded or not. When a record shall be made, signed and filed, as the statute prescribes, and it shall not appear from it that this inquiry was made of the defendant before he was sentenced, then it may be necessary, for that reason, to reverse the judgment pronounced, but not the conviction.

In that event, as the conviction was in all respects regular, the defendant would have to be brought again before the court, in order to have the inquiry made of him, before the sentence, whether he has anything to say why sentence should not be pronounced; for, where the conviction is regular, that is all the defendant can be entitled to for the purpose of redressing the error, under the terms of the statute relating to these cases. †

But, as no record has been made by which the point can now be brought before the court for its consideration, the judgment entered

* Id., 1029, § 29.

† Laws of 1863, 406.

in the clerk's minutes can be neither affirmed nor reversed, but the writ of error should be dismissed.*

DAVIS, P. J., and DONOHUE, J., concurred.

Writ of error dismissed.

JOHN B. GREENE, RESPONDENT, v. THE MAYOR, ETC., OF
THE CITY OF NEW YORK, APPELLANT.

Contract—void under section 104, of chapter 137, Laws of 1870, when made without advertising.

The plaintiff entered into a contract with the commissioner of public works, for laying water-pipes in the city of New York, and performed work and furnished materials thereunder. The contract was not founded upon sealed bids or proposals, made in compliance with public notice, as required by section 104, of chapter 137, Laws of 1870. *Held*, that the contract was void.

The case of *The People ex rel. Navano v. Van Nort* (64 Barb., 305) distinguished.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

This action was brought by the plaintiff to recover the sum of \$52,748.08, with interest from the 10th of November, 1871, for work executed, and supplies furnished by him, under and pursuant to two contracts, entered into on the 1st day of July, 1871, by and between him and the commissioner of public works, in behalf of the defendant, in laying water-pipes to extend the distribution of Croton water through the city.

It was alleged in the complaint, that the work, labor and services had been duly certified by the chief engineer of the Croton aqueduct and the commissioner of public works, and that upon the 10th day of November, 1871, the said commissioner made the necessary requisitions upon the comptroller of the city for the payment of the plaintiff, and that plaintiff's claim had been duly audited by the finance department.

* *Weed v. People*, 31 N. Y., 465.

The defendant alleged that the contract with the plaintiff was void, as the same was not founded upon sealed bids or proposals, made in compliance with public notice, duly advertised for ten days in newspapers in the city of New York, as required by the charter; and he also alleged, upon information and belief, that the prices or rates allowed to the plaintiff by his contract were excessive and extravagant.

When the case came on for trial at circuit, the judge granted a motion for judgment in favor of the plaintiff and directed the jury to find a verdict for the plaintiff for the amount claimed, with interest. From the judgment entered on this verdict, the defendant appealed.

E. Delafield Smith, corporation counsel, for the appellant.

John H. Strahan, for the respondent.

DONOHUE, J.:

Appeal from a judgment in plaintiff's favor. The facts are, that the plaintiff, under a contract with the department of public works, performed the work sued for, and the answer of the defendants is, that in substance the contracts are made without advertising for, or inviting sealed bids, as required, by section 104, chapter 137, Laws of 1870. The further defense that the work was charged at extravagant prices, was abandoned on the trial and on the appeal.

The claim on the part of the city is, substantially, that in order to protect itself from the ordinary liability, which, as a corporation, it might be under, for contracts improvidently made by its agents and servants, section 104 was passed; and, the intent and object of that law, is, that in cases calling for expenditures of \$1,000, unless three-fourths of the common council otherwise decided, sealed bids should be invited and the work done under some of these bids. Whatever may be the argument in the case as to the price being reasonable, the court can only look at the plain words of the act, and, no matter how meritorious the plaintiff's claim, follow that law; and, unless there is something that takes this work out of the ordinary rule, the plaintiff must fail.

The plaintiff claims that by an act, subsequent to that above quoted,* there is a provision authorizing the comptroller to borrow \$500,000, for the improvement of the lower reservoir, and for increasing the supply of water in the lower part of the city, under the direction of the department of public works, under which act this work was done; and plaintiff contends, under the authority of *Navano v. Van Nort*, † that the provision renders advertising for bids unnecessary. In that case, the court held, expressly, that the act under which that work was done, placed a discretion in the commissioner, inconsistent with doing the work under such bids; in fact, holding that the terms of the act expressly permitted the work being so done.

In this case, the section relied on, to bring the case within the *Navano v. Van Nort* case, vests no discretion in the commissioner, other than that in regard to any other work which the law places in his department. All work to be done under the commissioner, is to be done under such bids, and it is hard to see any distinction between the work here provided for and any other. The section 104 is one of great importance to the city, acting through its agents, and one, the policy of which the court is bound to sustain. The work here is the ordinary work of the department, and should have been done in the ordinary way. The plaintiff furnishes no excuse for the mode in which his contract was made, and he must fail. Judgment should be reversed, and new trial ordered.

Judgment reversed and new trial ordered, costs to abide the event.

* § 6, chap. 383, Laws 1870.

† 64 Barb., 205.

THE PEOPLE EX REL. THOMAS P. ELDRIDGE AND OTHERS
v. ENOCH L. FANCHER, JUSTICE.

Habeas corpus—res adjudicata—debts fraudulently contracted—discharge from.

One Friedlander, who was in the custody of the sheriff, under an execution issued against his person in favor of Eldridge and others, applied to Mr. Justice FANCHER, on *habeas corpus*, to obtain his discharge. The sheriff, in his return, alleged that a writ of *habeas corpus* had previously been granted by Mr. Justice ROBINSON, on the application of the said Friedlander, and that the judge had then decided that he was not entitled to his discharge, and that the adjudication was made on the same facts, on which he now asks his discharge in this proceeding. To this return, the prisoner put in a traverse, denying, as a matter of fact, that the case, as then presented, had been presented to, and passed on by Judge ROBINSON. To this the sheriff demurred. *Held*, on the demurrer, that the case was not *res adjudicata*.

Article 5, of chapter 5, title 1, part 2, of the Revised Statutes, entitled, "Of voluntary assignments," was not abolished by the passage of the non-imprisonment act of 1831 (the Stillwell act).

CERTIORARI to review the decision of Mr. Justice FANCHER, discharging, on *habeas corpus*, one Max Friedlander from the custody of the sheriff, under an execution against the person of Friedlander in favor of Eldridge and others.

The relators obtained judgment against Friedlander on the 29th of August, 1871, for \$2,572.89, and, on the 24th of September, 1872, after an execution upon the said judgment against the property of the said Friedlander, had been duly issued to the sheriff, and returned by him unsatisfied, an execution against his person was issued to the sheriff, upon which he held Friedlander at the time of the issuing the writ of *habeas corpus* by Mr. Justice FANCHER.

On the 5th of August, 1872, Friedlander applied, by petition, to one of the judges of the Court of Common Pleas, that his estate might be assigned for the benefit of all his creditors, and that his person might thereafter be exempted from arrest or imprisonment, by reason of debts arising upon contracts, pursuant to article 5, chapter 5, title 1, part 2, of the Revised Statutes, entitled, "Of voluntary assignments," and, on the 18th of October, 1872, the said petition and relief were granted.

An application was afterward made by Friedlander, upon a *habeas corpus*, to obtain his discharge from imprisonment upon the execu

tion against his person in favor of the relators. The judge refused to release him. The relators claimed that the former application was founded upon the same facts as the present one. This was denied by Friedlander.

G. A. Seixas, for the relators.

Thomas Allison & Horatio F. Averill, for Friedlander.

DONOHUE, J.:

In this case, the relator asks a review of the proceedings of Judge FANCHER, discharging one Friedlander from custody on *habeas corpus*.

The facts are, that Friedlander, owing debts on contracts fraudulently made, applied, under article 5, chapter 5, part 2, of the Revised Statutes of this State, to procure the exemption of his person from imprisonment under that act. He duly made the assignment and obtained his discharge under that act, and, being imprisoned in actions on some of the contracts made prior to his application, applied to Judge ROBINSON, on *habeas corpus*, to obtain his discharge, which was denied. He then, on a new writ, applied to Judge FANCHER, who, after hearing, granted the discharge sought now to be reviewed.

The first point raised by the relator's counsel, is that the question was *res adjudicata*. Any system of law which would keep a prisoner in custody, when the facts show him entitled to his discharge, would be a perversion of justice, and, unless there is some reason to believe that the case and questions, as presented to Judge FANCHER, had already been passed on by Judge ROBINSON, the point taken must fail. In looking at the record, we find that the proceedings before Judge ROBINSON were set up as a bar here, and that to such return the prisoner put in a traverse, denying, as a matter of fact, that the case, as then presented, had been presented to, and passed on by Judge ROBINSON. To this the sheriff demurred, and, on that demurrer, Judge FANCHER gave judgment. The case hardly presents such a state of facts as brings the relator within the rule laid down in the *Barry v. Merrick* case.* The

* 25 Wend., 64.

rule is there stated as broadly as courts could well go where liberty was concerned, and any extension of the rule would work injustice. As Judge ROBINSON did not pass on the case as presented to Judge FANCHER, this point must fail.

The next ground taken by the relator, is that the non-imprisonment act, in fact, abolished the article under which the original discharge was sought, because it made provision in respect to debts fraudulently contracted, and the mode of discharging them. In this the relator is mistaken. After the non-imprisonment act was passed, no discharge under any other provision as to simple contract debts, without fraud, was needed, and the article thus on the statute book, and continued in law for forty years, has only debts, fraudulently contracted, and on which persons can be arrested, to act on.

Again, that the act of 1831, non-imprisonment act, provides a mode, after arrest, of obtaining a discharge, gives no evidence that the legislature did not intend to give the debtor a mode at any time before arrest or final judgment, in which he could, on his own motion, and on a surrender of all he possessed, obtain such discharge. Article 6 provides for an entirely different proceeding, and has no application to the rights claimed by Friedlander.

Where, as in this case, in order to obtain his original discharge, the defendant had to assign all he possessed, and where it must be taken he did, there does not seem to be any good reason to strain the law to hold him.

DANIELS, J., concurred.

Proceedings affirmed.

JOHN L. BROWN, APPELLANT, v. THE MAYOR, ETC., OF
THE CITY OF NEW YORK, RESPONDENT.

Contract by commissioner of public works—when void under acts of 1857 and 1861—certificate of commissioners under chap. 580, Laws of 1872—what it must contain.

On the 27th of September, 1870, the commissioner of public works, in behalf of the city, entered into a contract with the plaintiff for regulating, grading and setting curb and gutter stones in Tenth avenue, from Manhattan to One Hundred and Fifty-fifth street, and flagging the sidewalk thereof, without complying with the provisions of section 38 of chapter 446 of the Laws of 1857, and chapter 308 of the Laws of 1861, requiring all contracts to be founded on sealed proposals, made in compliance with public notice; *held*, that the contract was void.

Section 1 of chapter 383 of the Laws of 1870 contains the following clause. "The commissioner of public works is hereby directed to immediately contract for the regulating and grading of the Tenth avenue, from Manhattan street to One Hundred and Fifty-fifth street;" *held*, that as the contract in suit provided for the setting of the curb and gutter stones and flagging the sidewalk, as well as for regulating and paving the avenue, it was unauthorized by the statute and void.

Seemle, that the statute merely authorized the commissioner to contract, without preliminary action of the common council or other local authority. It did not direct the manner of contracting, and the contract should, therefore, be made in compliance with the existing laws, and not arbitrarily, on such terms and with such persons as the commissioner might choose.

The commissioners, appointed under chapter 580 of the Laws of 1870, indorsed upon the plaintiff's contract, a certificate that they were "satisfied that there has not been any fraud in relation to the making or entering into the said contract;" *held*, that this was not sufficient, the statute requiring them to certify that "they are satisfied that no fraud has been perpetrated in relation thereto or in the performance thereof."

APPEAL from a judgment entered on an order of the judge before whom the cause was tried, dismissing the complaint.

John E. Develin, for the appellant.

E. Delafield Smith, corporation counsel, for the respondent.

DAVIS, P. J. :

This action was tried before Mr. Justice VAN BRUNT, at circuit. At the close of the plaintiff's case, the complaint was, on motion

of defendant's counsel, dismissed with costs. The action was brought upon a contract, made by the commissioners of public works on behalf of the city, with the plaintiff, on the 27th of September, 1870, "for regulating, grading and setting curb and gutter stones in Tenth avenue, from Manhattan to One Hundred and Fifty-fifth street, and flagging the sidewalk thereof." The questions raised upon the motion to dismiss the complaint were substantially: First, that the commissioners of public works had no authority under the law to enter into the contract. Second, that the contract was not founded upon sealed proposals, in compliance with the provisions of section 38 of the charter of 1857, and section 1 of the act of April 17th, 1861, entitled "An act relative to contracts by the mayor, aldermen and commonalty of the city of New York." Third, that the certificate of the contract commissioners, appointed under the provisions of chapter 580 of the Laws of 1872, was not in accordance with the requirements of the act, and did not validate the contract or relieve it from the objections as to the authority of the officers who made it.

On these grounds the learned justice granted the motion. Section 38 of the charter of 1857, and the act of April 17th, 1861,* require that all contracts shall be made by the appropriate heads of department, and shall be founded on sealed proposals, made in compliance with public notice, advertised in such newspapers of the city as may be employed for that purpose; that such notice shall be published ten days, and that all contracts shall be given to the lowest bidder, who shall give security. It was substantially conceded at the trial, that the contract in suit had been made by the commissioner of public works with plaintiff, without compliance with any of the requirements of the above provisions. It has been repeatedly held that a contract so made is void.†

It is, however, insisted by plaintiff that the power to make this contract, without compliance with the formalities required by the existing laws, had been expressly conferred by the legislature upon the commissioners of public works.

* Chap. 306, p. 702.

† *Brady v. The Mayor, etc.*, 2 Bos., 173, affirmed by Court of Appeals, 20 N. Y., 312; *McSpedon v. Stout*, 4 Abb., 22; *McSpedon v. The Mayor*, 7 Bos., 601; *Peterson v. The Mayor*, 17 N. Y., 449; *Bliss v. Matteson*, 52 Barb., 335.

In section 1, of the act of April 26th, 1870, entitled "An act to make further provisions for the government of the city of New York," * a clause appears in the words following: "The commissioner of public works is hereby directed to immediately contract for the regulating and grading of the Tenth avenue, from Manhattan street to One Hundred and Fifty-fifth street." This act, it will be observed, became a law on the 26th of April, 1870. The contract with plaintiff was not made till the 27th of September, 1870. No construction, founded upon the idea of immediate necessity, rendering it impracticable or inconvenient to comply with the forms of existing laws, need be given.

It is not easy to see that this provision goes any farther than to clothe the commissioner with power to contract, without preliminary action of the common council or any other local authority, to determine the necessity or expediency of the work. It is a direction to proceed immediately to contract, but how? It does not assume to direct the manner of contracting, nor indicate the person with whom the contract shall be made, and hence the reasonable construction is, that the contract was intended to be made in compliance with the existing laws, and not arbitrarily, on such terms and with such person as the commissioner might choose.

But, however this may be, it is clear that the contract was not made in conformity with the authority given by the provision of the act of 1870, above quoted.

That provision only gave authority to contract for the regulating and grading of the street. The power assumed under it, was not only to contract for the regulating and grading, but also for setting the curb and gutter stones, and flagging the sidewalk, an addition which the bills in the case show, added many thousand dollars to the price to be paid. The authority conferred was not pursued; hence, the contract must be deemed to be subject to the general law, and, within the authorities, is invalid, unless cured by the certificate of the contract commissioners.

The plaintiff proved and read in evidence, a certificate of the commissioners, appointed under chapter 580, of the Laws of 1872, indorsed on said contract. The first section of that chapter declares

* Chapter 383, Session Laws of 1870, p. 384.

that "no contract or agreement made or entered into within five years last past, by any department or officer," of the kind mentioned therein, "shall be held regular, sufficient or valid," when any of the several defects, specified in the act, exist, "unless the commissioners hereinafter appointed, or a majority of them, shall certify, in writing, upon the contract or agreement, that they are satisfied that no fraud has been perpetrated in relation thereto, or in the performance thereof, but such contracts and agreements are hereby ratified and confirmed and declared to be valid and binding in each and every case in which such commissioners, or a majority of them, shall certify as hereinbefore provided." The omissions and defects in the manner of making the contract in this case, and the want of authority of the officer to make the same, are of the kind which the statute declares may be cured by the prescribed certificate, but which it also declares shall be fatal, unless the certificate be obtained. The certificate of the commissioners was made on the 5th day of August, 1872. It appears that, at that time, the work under the contract was about four-fifths done. The certificate certified that the commissioners "*are satisfied that there has not been any fraud in relation to the making or entering into the contract.*" The statute requires that the commissioners certify on the contract "*that they are satisfied that no fraud has been perpetrated in relation thereto or in the performance thereof.*"

The certificate given, fails to comply with the statute in two particulars.

First. It does not certify that the commissioners are satisfied *that no fraud has been perpetrated in relation to the contract*, but limits their consideration of the question of fraud, to "*the making or entering into the contract.*"

It is not difficult to conceive that fraud may have been perpetrated "*in relation to the contract*," which may properly be said not to be "fraud in relation to the making or entering into the contract." The one certificate is broader and more comprehensive than the other, and it is the broader one which the statute requires.

Second. The certificate does not certify that the commissioners are satisfied that no fraud has been perpetrated *in the performance of the contract*. It is urged that this requirement relates only to contracts that have been *wholly* performed, while this contract

had been but about four-fifths performed. This distinction does not seem to be sound. Whatever had been done under the contract, was clearly done "in performance" of it; and to hold that, because the contract had not been fully completed, therefore the question, whether fraud had been perpetrated in doing four-fifths of the work under it, was not to be investigated by the commissioners, is to give a narrow and very stringent operation to the act. On the contrary, the purpose was to require an investigation which should determine, before an invalid contract should become valid by force of the statute, that there had been no fraud in relation thereto, and none in the performance of it, whether complete or incomplete. The learned justice was, therefore, correct in ruling that the contract was not obligatory upon the defendants.

But it is insisted that the act of the legislature, passed 20th January, 1871,* has ratified and made valid the contract in question. That act authorizes and directs the board of assessors, to assess upon the property benefited, in the manner provided by law, the expense which has been or shall be actually incurred by the mayor, etc., in regulating, grading and setting curb and gutter stones, and flagging sidewalks in Tenth avenue, from Manhattan street to One Hundred and Fifty-fifth street. It might, perhaps, be answered to this position, that since the contract made by the commissioner of public works, was and is void, no expense under it has been incurred by the city; but a better answer is found in the fact that no reference is made to any contract, and no intent is manifest in the laws, to deprive the city of any defense existing against any contract. The provision is equally applicable to any expense that may have been incurred for the purpose named, independently of plaintiff's contract. Besides, it appears that a very considerable amount has been paid by the officers of the corporation for work done by plaintiff, and it may well be said that the intention was to enable an assessment and collection of such moneys without affecting, in any wise, the validity of the contract itself. It often occurs that the legislature authorizes assessments to indemnify towns and counties for moneys expended or incurred; but it has probably not been held, that by so doing, it conclusively establishes a liability, on

* Chap. 5, Laws of 1871, p. 4.

the part of the town or county, which before had no legal existence, by making valid an unlawful contract.

The judgment appealed from should be affirmed.

DANIELS and DONOHUE, JJ., concurred.

Judgment affirmed.

JAMES E. McVEANY, PLAINTIFF, v. THE MAYOR, ETC., OF
THE CITY OF NEW YORK, DEFENDANT.

Salary—payment by city to person in possession of the office—right of the board of aldermen to judge of the election of its own members.

The plaintiff claimed to have been elected assistant alderman. The board of assistant aldermen decided in favor of his opponent, who was admitted to the board, discharged all the duties of the office and received the salary thereof; in a *quo warranto*, brought on the relation of plaintiff against his opponent, it was decided that plaintiff was entitled to the office; he never occupied nor performed any of the duties of the office. This suit was brought to recover the salary attached to the office for the term during which he claimed to have been elected; *held*, that he could not recover; that his remedy, if he had any, was against those who received the salary, or who wrongfully excluded him from the office.

THIS case was tried at the circuit before a jury. The judge nonsuited the plaintiff, directing that the exceptions be heard in the first instance at the General Term, and that judgment be in the meantime suspended. The plaintiff claimed that, at the charter election in 1868, he was elected assistant alderman of the ninth assistant aldermanic district.

It was admitted by the plaintiff, that, at the election at which he claimed to have been elected, the canvassers' certificate of election was given in favor of Peter Calkin, who took the oath of office in December, 1868, and performed and discharged the duties of assistant alderman during the year 1869.

In January, 1869, a suit was commenced by the Attorney-General, on the relation of the plaintiff, against Calkin, to oust him from the office, and have the plaintiff declared duly elected thereto.

On the 7th of June, 1869, judgment was entered in this action, declaring the plaintiff to be entitled to the office.

On the twenty-first of June, plaintiff appeared before the board of assistant aldermen and claimed his seat. The board refused to permit him to act. The term for which the plaintiff claimed to be elected, commenced January 1, 1869, and was to continue for one year.

James Clark and David McAdam for the plaintiff. The judgment in the *quo warranto* proceedings, judicially determines the plaintiff's right to the office, and this adjudication is conclusive on the city. (Cooley's Blackstone, vol. 3, p. 263; *People v. Cook*, 14 Barb., 259; affirmed, 4 Selden, 67; *People v. Conover*, 6 Abb., 220; *In re Welch*, 7 How., 282; Code, §§ 432, 434; *Hawes v. Walker*, 23 Barb., 304; *Morgan v. Quackenbush*, 22 Barb., 77.) That *quo warranto* was the proper remedy to try the plaintiff's title to the office. (*Lewis v. Oliver*, 4 Abb., 121; *Bowen v. Lease*, 5 Hill, 221; *Williams v. Potter*, 2 Barb., 316; *Mayor v. Walker*, 4 E. D. Smith, 258; *People v. Deming*, 1 Hilt., 271; *People v. Cicotte*, 16 Mich., 233; *People v. Holden*, 28 Cal., 123; *Kerr v. Trego*, 47 Penn., 292.) That the salary followed the legal title, and that payment to one in possession without title constituted no defense. (*People v. Smyth*, 28 Cal., 21; *People v. Ocelton*, id., 44; *Carroll v. Liberthaler*, 37 id., 183; *United States v. Addison*, 6 Wall., 291; 50 Barb., 516.)

A. J. Vanderpoel and E. Delafield Smith for the defendant. The plaintiff having rendered no services, could receive no salary. (*Smith v. The Mayor, etc., of New York*, 37 N. Y., 518; *Id.*, 1 Daly, 219.) The action of the board of assistant aldermen was conclusive. (*State v. Coms. of Railway*, 4 Vroom, 112; 1 Story on Cons., § 833; Brightley on Elec., p. 654-659; *Comms. v. Messer*, 44 Penn. R., 341.)

DONOHUE, J.:

The plaintiff claims that he was duly elected an assistant alderman of the city of New York, for the period for which he claims salary, and performed, as far as he was able to do, the duties of his office.

Defendants deny the statement of plaintiff, and allege that one Peter Calkin was elected; that the plaintiff, then claiming to be elected, submitted his claim to the board of assistant aldermen, elected for that purpose; that the board of assistant aldermen decided that Calkin was elected, and rejected plaintiff's claim. Defendants deny that they excluded plaintiff from office, and allege that the salary for the office and position claimed by plaintiff during the term, was paid to Calkin, who performed all the duties.

An offer on the trial to prove that the plaintiff received the highest number of votes, was properly rejected.

The plaintiff was allowed, under defendant's objection, to prove a record in the case of *The People*, on plaintiff's relation, against Calkin, on which he was adjudged to be entitled to the office. This record was not between the parties to this suit, and was never followed by the admission of the plaintiff to the rights claimed under it. The plaintiff never occupied or performed any of the duties of the office claimed during the term, and, within the principles of the case of *Smith v. The Mayor*,* cannot recover, even if the question of his right to the office was settled. To hold that a party, never in the office or exercising its duties, could recover the fee or salary from a party who was no party to keeping him out of the office, would be impossible; the acts and doings of the party *de facto* holding the office, must bind (or will, in receiving the salary), as in other acts. The plaintiff here has his remedy against those who received the salary, or who wrongfully aided in keeping him out, if he has any remedy.

But if this point is not conclusive, had the court, in the record presented on the trial below, the power to hear and determine the right to the office? By the seventh section of chapter 446, Laws of 1857, the law provides that the board shall "be the judge of the election, returns and qualifications of its own members." Now it is sought by the case put in evidence, to test the right of a member of the board of aldermen, or assistants, to such seat, by a proceeding between two persons, one not a member of the board and one a member, without making the board a party in any way. In the case

*87 N. Y., 518.

of Calkin, after the judgment, no steps were taken by the relator to enforce the judgment or make the board a party to it by compelling, or attempting to compel, the board to admit him to a seat. That the plaintiff himself felt his judgment of no avail, is shown by the fact that, although he was declared by that judgment entitled to the office in June, 1869, he took no steps whatever to enforce his right, and now asks that the defendants, who have paid the salary to one who performed the duties, should pay it over to him who has not. Neither of the cases cited, go the length of showing that the board could have been compelled to admit him, and when the board did not, and the charter under which they acted states that they shall be the judges of the election of their members, it would be contrary to all precedent, to hold that the city must, at its peril, pay the plaintiff, when he neither performed the duties or filled the office he asks pay for. The verdict was correct, and the judgment should be affirmed.

Judgment affirmed.

ARCHIBALD HAYS, APPELLANT, v. WILLIAM GOURLEY,
ADMINISTRATOR OF, ETC., OF ELIZABETH HAYS, DECEASED,
RESPONDENT.

Will—remainder—when vested.

James Hays died in 1828, leaving a will, by which he directed his executors to turn his estate into money, invest the same, and apply the income thereof to the support and maintenance of his wife and children. Then follows the following provision: "I will, devise and bequeath unto my said children, William, Mary and James, all my estate, both real and personal, of all kinds whatsoever, to be equally divided between them, share and share alike, upon the event of the death of their mother, my said wife." *Held*, that the children took vested remainders immediately upon the death of the testator.

APPEAL from a final decree of the surrogate of the city of New York. The facts appear in the opinion.

John P. Reed, Jr., for the appellant.

Cassedy & Brown, for the respondents.

WESTBROOK, J. :

The question which this cause presents, is this: do the next of kin of the *husband*, James Hays, deceased, or of the *wife*, Elizabeth Hays, deceased, succeed to the estate owned by the husband at the time of his death?

James Hays died in the city of New York in the year 1828, leaving a last will and testament, which was duly admitted to probate by the surrogate of New York, January 16th, 1829.

He left surviving him, his widow, Elizabeth Hays, and his three children, William, Mary and James.

The will directed that his executors should turn his estate into money, invest it, "as in their judgment they may deem best," "the proceeds, rent, income or interest" to be "employed and used for the support and maintenance" of his said wife Elizabeth, and his children, William, Mary and James, "and for the education of said children." It next provided that each of the children on arriving at the age of twenty-one, or at the time of marriage, if such marriage was with the consent of the mother, if living, should receive the sum of \$1,000.

The next clause of the will was as follows: "I will, devise and bequeath *unto my said children*, William, and Mary, and James, *all my estate, both real and personal*, of all kinds whatsoever, *to be equally divided* between them, share and share alike, *upon* the event of the *death* of their *mother*, my said wife Elizabeth."

The mother of the children and wife of the testator, Elizabeth Hays, outlived all the children, and departed this life in the city of New York in the year 1870. The children, James and Mary, died before their brother William, unmarried, without issue, and intestate. William also died intestate, without issue, leaving no widow, brother or sister. The appellant is the brother of the testator, James Hays, and claims the property as his next of kin. The respondent is the administrator of Elizabeth Hays, deceased, and claims it for the benefit of her estate.

The executors of the will of James Hays, deceased, are all dead. One John Adams was appointed administrator, with the will annexed, of said James Hays, deceased, and applied for a final settlement of his accounts. Pending such accounting, he also died, and his executor (Allen H. Adams) continued the accounting.

Upon such accounting, the executors of Elizabeth Hays, deceased, insisted, that, under the statute of distributions, the mother of the deceased children took all the property as their next of kin. On the other hand, the appellant claimed that the estate of James Hays, deceased, never *vested* in the children at all; that the title thereto was in the executor of the will of James Hays, deceased, and that, consequently, nothing whatever passed to the *mother*, but that the whole estate descended to him as the next of kin to the *father*. The surrogate took the former view, and the brother of the father brings this appeal. As the whole estate was to be turned into money, the will is of course to be construed as a will of personal property.

The only question to be disposed of, is this: Did the estate vest in the children, by the terms of the will, immediately upon the death of the testator? If it did, the decision of the surrogate was right.

In *Everitt v. Everitt*,* DENIO, Ch. J., thus states the rule which governs this case: "The leading inquiry upon which the question of vesting or not vesting turns, is whether the *gift is immediate, and the time of payment or of enjoyment* only postponed, or is future and contingent, depending upon the beneficiary arriving of age, or *surviving some other person*, or the like."

The clause of the will quoted *supra*, expressly wills, devises and bequeaths all his estate, both real and personal, to the children, and only postpones the *division* of the property "upon the event of the death of their mother." "The gift," to use the language of Judge DENIO, "is immediate, and the time of payment or of enjoyment only is postponed."

It follows that the decree of the surrogate was right, and should be affirmed, with costs of appeal to be paid by appellant.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed, with costs to be paid by appellant.

*29 N. Y., on p. 75.

APOLLONIE MUNDORFF, RESPONDENT, v. JACOB MUNDORFF, AS ADMINISTRATOR OF JOHN MUNDORFF, DECEASED, AND OTHERS, APPELLANTS.

Interlocutory decree — referee — powers of — Code, § 268 — motion for new trial.

The practice which formerly prevailed in the Court of Chancery, of determining the rights of parties to suits in equity, in the first instance, upon the hearing by an interlocutory decree, and then, when necessary, referring the case to a master, to take and state the account, still continues in force.

Ordinarily, where the whole issue is referred, it is the duty of the referee to take, state and adjust the accounts of the parties on the basis on which, by his decision, he may settle their rights.

But where, for any reason, this is not done, and an interlocutory report only is made, by which the rights of the parties are determined, and a further hearing is directed to settle the accounts between them, the court has power to direct that to be done before another referee.

His report, made in this manner, sustains all the relations to the case the former interlocutory decree did, in hearings had in the Court of Chancery.

Such decree may now be reviewed at General Term, by a motion for a new trial.

APPEAL from an order made at Special Term.

This action was brought by the plaintiff, the widow of John Mundorff, deceased, to set aside a receipt given by her to the defendant, Jacob Mundorff, as administrator, so far as it operated as a release of her claims against the estate, on the ground of fraud; for an accounting of the estate; and for the enforcement of an antenuptial contract entered into by the plaintiff and the deceased.

By an order, dated October 13th, 1871, the case was, by consent, referred to a referee, "to hear and decide all the issues in the action, and to take any account that he may determine should be taken."

He made and filed his report, March, 1873, deciding the equitable rights of the parties, and then directed that an accounting should be had of the administration of the estate of John Mundorff, deceased, declining to proceed with it himself.

On the motion of plaintiff's attorney, an order was made at Special Term, on the 5th of April, 1873, referring the case to another referee, to take and state an account of the estate. From this order the defendants appealed.

F. G. McDonald, for the appellant.

Elial F. Hall, for the respondent.

Term of the Superior Court, in the case of *Trufant v. Merrill*.^{*}
The order should be affirmed, with costs.

DAVIS, P. J., and DONOHUE, J., concurred.

Order affirmed, with costs.

THE UNION MANUFACTURING CO., RESPONDENT, .v.
AARON H. BYINGTON, APPELLANT.

Referee's report — exceptions to — evidence — sworn declarations of witnesses — admissibility of — depositions — memoranda.

Where an exception to a ruling or direction of a referee is specific, resting on special grounds and reasons, no objection to the ruling or direction, except those so specified, will be considered upon appeal. Upon the cross-examination of one of defendant's witnesses, an affidavit made by the witness several years before, and which tended to contradict the evidence given by him on the trial, was presented to him by plaintiff's counsel and he admitted the signature to be his, and that his memory was fresher at the time it was made than at the time of his examination; plaintiff's counsel declined to allow the defendant's counsel to see the contents of the affidavit, and refused to put it in evidence. At a later period of the trial he offered it in evidence, and, against the objection of the defendant, it was received. *Held*, that this was error, as the defendant had been prevented from examining the witness concerning its contents; that, before he could be affected by the affidavit which his witness had made, without his privity or knowledge, he was entitled to show the circumstances under which it was made, the reasons existing for making it, and any other matter that might have impaired the force of its unexplained statement.

An affidavit made by one of the plaintiff's witnesses some years before, and corroborating the testimony given by him upon the trial, was received. *Held*, that this was error; that it was simply the declaration of the witness, and the fact that it was sworn to, did not render it admissible.

Neither of the affidavits was admissible as a memorandum; each was made several years after the occurrence, not with a view of making a memorandum of it, and the witnesses themselves were able to testify from recollection on the subject to which the affidavits related.

APPEAL from a judgment, in favor of the plaintiff, entered upon the report of a referee.

^{*} 37 How., 531.

This action was brought to recover the sum of \$3,131.56, and interest from May 22, 1862, for a balance on goods sold and delivered to the defendant. The answer denied the purchase, and set up two counter-claims, one for commissions and the second for use and occupation of a portion of defendant's premises for storage.

The plaintiff replied, denying all the allegations in the answer respecting the counter-claims. The case was referred to a referee to hear and determine. The referee reported in favor of the plaintiff, not for goods sold and delivered, but for money received by him as the agent of the plaintiff, in selling the goods described in the complaint.

Wm. Henry Arnoux, for the appellant. The referee erred in adjudging that on the pleadings and proofs, the plaintiffs were entitled to recover; the judgment must be *secundum allegata et probata*. (*Ferguson v. Ferguson*, 2 N. Y., 361; *Kelsey v. Western*, 2 id., 500-506; *Wright v. Delafield*, 25 id., 266; *James v. McKernon*, 6 Johns., 563; *Lyon v. Tullmadge*, 14 id., 516; *Crocket v. Lee*, 7 Wheat., 522; *Woodruff v. Dickie*, 31 How., 164.) The affidavit of Colonel Hathaway should not have been admitted without an opportunity to cross-examine him. (*Lee v. Potter*, 2 Keyes, 543; *Pendleton v. Empire Stove Co.*, 19 N. Y., 13; *Newcomb v. Griswold*, 24 id., 298; *Hubbard v. Briggs*, 31 id., 518; *Romertze v. East River N. Bank*, 49 id., 577; *Gaffney v. People*, 50 id., 416.)

Luther R. Marsh and R. Rowley, for the respondent.

DANIELS, J. :

The action was brought for the price of goods, alleged to have been sold and delivered by the plaintiff to the defendant, and the recovery had for the proceeds of goods received and sold by the defendant as the plaintiff's agent.

This, it was insisted upon at the argument, could not be lawfully allowed, but, as the exception taken to the referee's direction, that the plaintiff should have judgment for the amount found to be due from him, is specific, resting on special grounds and reasons, and this objection is not among them, that point is not presented for

consideration. By specifying particular objections to the recovery directed, and omitting the one so elaborately argued, the latter was necessarily excluded from the case.

During the trial the defendant claimed commissions, as such agent, for cloth claimed to have been sold by him, for the plaintiff, to the quartermaster of the State of Connecticut, for the manufacture of soldiers' overcoats, and afterwards delivered to, and manufactured by, the firm of Day, Griswold & Co. The amount claimed for those commissions, was the sum of \$1,374. The defendant's evidence, as a witness, tended to prove the justice of this claim. He stated that the sale was made by his exertions as the plaintiff's agent, and, if he was right in that statement, he was entitled to his commissions for making it.

John M. Hathaway was examined as a witness in the defendant's behalf, for the purpose of sustaining the claim that the sale was made by means of his agency. During the progress of the cross-examination of this witness, an affidavit was presented to him by the plaintiff's counsel, and he stated that the signature to it was his, and that his memory was fresher in 1864 than at the time of his examination. The plaintiff's counsel declined to allow the defendant's counsel to examine or see the contents of the affidavit, and refused to put it in evidence. At a later period in the trial, it was offered in evidence, and then objected to by the defendant, for the reasons that the plaintiff's counsel refused to put it in evidence when the witness was on the stand, or permit it to be examined so that the witness could be cross-examined in relation to it. The objections were overruled and the affidavit allowed to be read, to which the defendant's counsel excepted. This affidavit was sworn to in March, 1864, while the trial took place in November, 1869, and, in substance, it showed that the sale was not produced through the intervention of the defendant's agency.

The objection that it was improper, under the circumstances, as a contradictory statement of the evidence given by the witness, was not taken by the defendant. But the objection that he had been prevented from examining the witness concerning its contents, because the plaintiff's counsel withheld it while the witness was under examination, was taken, and it was an objection which the referee ought to have sustained. Before the defendant could be

affected by the affidavit which his witness had made without his privity or knowledge, he was entitled to show the circumstances under which it was made, the reasons existing for making it, and any other matter that might have impaired the force of its unexplained statements. This he was deprived of, by the affidavit's being withheld from the possession or inspection of his counsel. It was both unfair and unjust, and prevented him from availing himself of an important legal right.

Another witness was examined on the same subject, on behalf of the plaintiff, who had previously made an affidavit embodying the subject upon which he gave evidence, and that was offered by the plaintiff, and received by the referee, under the objection that the former declarations of the witness were not evidence for the plaintiff. The defendant objected to the ruling by which this affidavit was allowed to be read. The affidavit showed that the witness had sworn substantially the same in March, 1864, when it was taken, as he did upon the trial, and his statements, on both occasions, tended to disprove the validity of the demand, made for commissions on account of the sale of the cloth for the overcoats. This affidavit contained simply the sworn declaration of the witness who made it. It was no less so by reason of the fact that it had been sworn to by the witness. It had no claim to admissibility, because the witness had sworn to the declaration which he made.

To entitle the deposition of a witness to be read in evidence, the formalities required to be observed by positive law, must appear to be complied with, and they secure the party, to be affected by the evidence, the privilege of cross-examination. Where such provisions are disregarded, the deposition, though taken under all other formalities, is not admissible as evidence.*

There is no principle on which the admission of this affidavit, as confirmatory evidence of that given by the witness during the trial, can be sustained. It was simply the declaration or admission of the witness, on a preceding occasion, of what he claimed to know concerning this portion of the controversy between the parties to this action, and it derived no force, as evidence, from the circumstance of its being sworn to, because of its *ex parte* and informal

* 1 Greenleaf on Ev., 12th ed., 539, § 553.

character. But, if it did, the statement would still be liable to the objection taken upon the trial, that it consisted only of the declarations of the witness, at a time when he was not in a position to be examined, as to their accuracy, by the party whose claim was proposed to be disproved by them.

As memoranda made by the witnesses, neither affidavit was proper. Each was made several years after the occurrence, not with a view of making a mere memorandum of it, and the witnesses themselves were able to testify from recollection on the subject to which the affidavits related. The latter circumstance, of itself, was sufficient to render them improper evidence as memoranda.* Both these affidavits tended to disprove the claim made by the defendant. And, as it was rejected by the referee, they must be presumed to have had their appropriate effect in producing that result.

He has, therefore, been prejudiced by the rulings of the referee, allowing them to be read. In consequence of these rulings, there must be a new trial in the action, and for that purpose, it will be unnecessary to consider the other objections taken to the conclusions of the referee.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and WESTBROOK, J., concurred.

Judgment reversed and new trial ordered, with costs to abide the event.

* *Meacham v. Pell*, 51 Barb., 65; *Russell v. Hudson River Railroad Co.*, 17 N. Y., 184.

ELLEN MURRAY AND BERNARD McCAFFERTY, AS SOLE
SURVIVING EXECUTRIX AND EXECUTOR, ETC., RESPONDENTS, v.
SIMEON E. CHURCH, IMPLEADED WITH MARGARET
LOUISE WOOD AND OTHERS, APPELLANTS.

Practice—demurrer—executor—suit by.

Where the plaintiffs were described in the title of the cause as executrix and executor, and, in the body of the complaint, a good cause of action is completely alleged and set forth, but it appears to be in the plaintiffs' own right, and not in their representative capacity, *held*, that a demurrer on the grounds that the plaintiffs had no capacity to sue, it not appearing from the complaint that they were executrix and executor, and that the complaint did not state facts sufficient to constitute a cause of action, was frivolous.

APPEAL from a judgment, entered in favor of the plaintiff, for the foreclosure and sale of the real estate described in the complaint, and from an order overruling demurrer as frivolous, and directing judgment for the plaintiffs.

The defendant, Church, demurred to the complaint on the grounds:

First. That the plaintiffs have not legal capacity to sue. It does not appear from said complaint that the plaintiffs have any authority to represent the estate of Peter Murray, deceased, as executrix or executor, or otherwise, or that there is any such estate.

Second. That complaint does not set forth facts sufficient to constitute a cause of action.

On the motion of the plaintiffs' counsel, an order was made at Special Term overruling defendant Church's demurrer as frivolous, and directing judgment for the plaintiff, and referring the case to a referee to compute the amount due. Upon the coming in of his report, without further notice to the defendant, judgment of foreclosure was entered, and an allowance of two and a half per cent made to the plaintiffs. The facts are stated in the opinion.

S. E. Church, for the appellant.

Boardman & Boardman, for the respondents.

DANIELS, J. :

The plaintiffs in the title of this action, described themselves as executrix and executor of the last will and testament of Peter Murray, deceased. And they then proceed, for the purpose of alleging a cause of action, to set out in the complaint, the execution and delivery by the defendants, Margaret L. and Henry Wood, to the plaintiffs, in their individual capacity, of a bond and mortgage to secure the sum of \$5,500, with interest. They also show that the moneys secured and agreed to be paid, have become due, and that the same are wholly unpaid.

That the other defendants have some interest in, or lien upon the mortgaged premises, or some part of them, which accrued subsequent to the lien of the mortgage. The mortgage is alleged to have been recorded, and judgment of foreclosure and sale is demanded. A good cause of action is completely alleged and set forth in the complaint, but it appears to be in the plaintiffs' own right, and not in their representative capacity.

If they had not described themselves as executrix and executor, no possible objection could be made to the cause of action alleged. It would then be as complete and perfect as any rules of pleading could require it to be.

The circumstance that they did so describe themselves, does not, in any manner, change the effect of the facts alleged.

That is merely a description of their persons; and, in view of the facts stated, it does not warrant the conclusion that the suit must be maintained by them in that capacity.

They were at liberty, notwithstanding that description, to rely upon a cause of action existing in their favor, in their own right; and, in doing so, their complaint, being sufficient in all other respects, was not demurrable on account of the fact that, in the title of the action, they describe themselves as having a representative character.

This point was very well settled by the case of *Merritt v. Seaman*,* and the authorities referred to in the opinion of Judge GRIDLEY.

As the bond and mortgage were executed and delivered to the plaintiffs, and secured the moneys, mentioned, to them, they did

* 2 Seld., 168.

have the legal capacity to maintain the present action for the foreclosure of the mortgage, although they were executrix and executor, precisely as the title of the action stated them to be, and the facts set forth in the complaint, presented a perfect cause of action in their favor. The demurrer presenting only these objections, was, therefore, clearly frivolous, and was properly overruled as such.

The allowance made, of two and a half per cent, was within the discretion conferred upon the court in this class of cases.*

And there is nothing in the case, showing that it was improperly exercised on the present occasion.

But, if there were anything of that nature in the case, it would not aid the defendant appealing, because no exception was taken presenting it for consideration.

As no other objections are presented by the appeal, the judgment should be affirmed with costs.

DAVIS, P. J., concurred.

Judgment affirmed, with costs.

VERNON K. STEVENSON, APPELLANT, v. THE MAYOR,
ETC., OF THE CITY OF NEW YORK, RESPONDENTS.

Statutes — provisions of, when held to be directory — chapter 408 of 1867.

By chapter 408, of the Laws of 1867, Madison avenue was laid out and extended from Eighty-sixth, to One Hundred and Twentieth street; its precise location, width and extent being prescribed by the first section. By the second section, it was made the duty of the corporation counsel, within three months after the passage of the act, to take the necessary legal means to open the street. *Held*, that the provision, as to the time within which the proceedings should be commenced, was directory merely, and that the time mentioned was not essential to the validity of the proceedings, if they were, in all other respects, afterwards properly taken.

The resolution of the common council, directing the corporation counsel to take proceedings to open the street, was not published in all the corporation newspapers prior to its adoption, as required by the charter. *Held*, that as the improvement

* Code, § 309.

FIRST DEPARTMENT, MARCH TERM, 1874.

was fully provided for by the act, and the proceedings taken conformed to it, though not instituted within the time required by it, they were valid and effectual without any resolution of the common council, and the omission to publish it, as the law requires in other cases, in no way impaired the authority which the statute provided for extending the street.

APPEAL from an order sustaining a demurrer to the complaint.

The plaintiff is the owner of certain lots fronting on Madison avenue, between Fifty-eighth and Fifty-ninth streets, in the city of New York, which have been assessed for the opening of Madison avenue, from Eighty-sixth street to One Hundred and Twentieth street.

The plaintiff claimed that the assessment was void, and brought this action to have the defendants perpetually enjoined from enforcing or collecting the same.

By the first section of chapter 403, of the Laws of 1867, a certain piece of land, therein particularly described, "is hereby declared, for all legal purposes, to be one of the streets of said city, in like manner as if the same had been laid out by the commissioner, etc." Section 2 is as follows: "It shall be the duty of the counsel to the corporation in the said city, within three months after the passage of this act, to take the necessary legal means to open, as a street, the said extension of Madison avenue." The act took effect, April 16, 1867.

On the 19th of February, 1868, the common council adopted a resolution, directing the counsel to the corporation to take the necessary legal measures to have Madison avenue opened according to law. In pursuance of this resolution, the proceedings were instituted, under which the present assessment was laid. The resolution was not advertised in the corporation newspapers, as required by the charter, prior to its adoption. The defendant demurred to the complaint, upon the ground that no cause of action was alleged therein. The demurrer being sustained, and the complaint dismissed, the plaintiff appealed.

Oliver W. West, for the appellant. The provision of the second section, requiring proceedings to be commenced within three months, is mandatory. (*Potter's Dwaris on Statutes*, 224; *Adriance v. McCafferty*, 2 Robertson, 153; *People v. Schermer*

horn, 19 Barb., 539; *State v. McLean*, 9 Wis., 292; *Webster v. Trench*, 12 Ill., 302.) The failure to publish the resolution, was fatal to the assessment. (*In re Douglass*, 46 N. Y., 42.)

E. Delafield Smith, corporation counsel, for the respondents. The provision of the statute, as to the time within which the street was to be opened, was directory. (*People v. Allen*, 6 Wend., 486; *Gale v. Mead*, 2 Denio, 160; *U. S. Trust Co. v. U. S. Fire Ins. Co.*, 18 N. Y., 199; 5 Cowen, 269.)

DANIELS, J.:

By chapter 403, of the Laws of 1867, Madison avenue was laid out and extended from Eighty-sixth to One Hundred and Twentieth street; the first section of the act defined its precise location, width and extent,* consequently, nothing further was left to be done but to open and improve it within such bounds, in order to render it serviceable to the public. And to attain that end, the counsel to the corporation was required, within three months from the passage of the act, to take the necessary legal means to open the extension as a street.† No further or other proceedings, whatsoever, were prescribed for that purpose. And as those means were defined by preceding laws, no uncertainty existed as to what was required to complete the extension as a street. They required commissioners of estimate and assessment to be appointed; the statutory duties imposed upon them to be performed; the subsequent confirmation of their proceedings; and the grading and paving of the extension by the respondent. That was the clear scope and design of all the act could possibly contemplate.

But the proceedings, required to be taken for that purpose by the corporation counsel, were not instituted until after the three months, mentioned in the second section of the act, had expired, and for that reason it is insisted, on behalf of the plaintiff, that his power to proceed at all, was extinguished. This was a proceeding required for the benefit of the public. Its object, as well as that of the statute, was to secure the opening of the extension as a street, for the use and convenience of the public; to create what seems to

* Vol. 1, Laws of 1867, p. 960.

† Id., § 2.

have been regarded by the legislature, and undoubtedly was, a public improvement. That, and nothing but that, was to be obtained under the provisions of the law. And it could not have been intended that the public should be deprived of the benefit of the improvement, if the officer, whose duty it was to proceed, neglected to do so within the three months mentioned, as long as no such result was declared to be the consequence of his omission. The act provided for the extension and opening of the street; that was its leading and paramount object, and, to secure that, required the corporation counsel to take the requisite proceedings to ascertain and assess the expenses, within three months afterward. But it did not provide that the taking of the proceedings, within the period mentioned, should constitute a condition, on which the existence of the extension, as a street, should depend; nor that the proceedings should not be taken at all, unless they were taken within the time prescribed. And, as long as the legislature imposed no such restriction, it is clear that the courts have no right to add it to the statutes.

In that state of the law, the time mentioned is not essential to the validity of the proceedings, if they are, in all other respects, afterward properly taken. It is the duty of the public officer, who is required to proceed within a specified period, to do so, and a willful neglect to do so, would probably be a misdemeanor on his part under the statutes of this State. But his neglect should not be allowed, under such a statute as this, to deprive the public of the benefit of a valuable improvement in an important street of the city. The settled rule of construction, requires no such consequence to be attached to the violation of a legal duty of this description; on the contrary, the time mentioned, in the manner this was, is considered to have been intended by the legislature as directory merely, and that the enterprise itself should not fail by reason of neglect to comply with the requirement made in that respect; the essential object and purpose of the law are not allowed to be defeated by a circumstance of that description.* The cases

* *Thomas v. Clapp*, 20 Barb., 165, 167; *Pond v. Negus*, 3 Mass., 230; *Cole v. Green*, 6 Man. & G., 872, 890; *Marchant v. Langworthy*, 6 Hill, 646; 3 Denio, 526; *Gale v. Mead*, 2 id., 160; *People v. Holley*, 12 Wend., 481; *People v. Peck*, 11 id. 604; *Jackson v. Young*, 5 Cowen, 269; *People v. Allen*, 6 Wend., 486.

of *People v. Schermerhorn** and *Adriance v. McCafferty*† are in no way in conflict with this principle. They were decided under different circumstances, requiring a different principle for their disposition. They depended upon the fact of notice, not the time within which it should be given; and the notices required, were also conditional in their nature.

The plaintiff's property assessed, as benefited by the extension, fronted upon Madison avenue, between Fifty-eighth and Fifty-ninth streets. It was, therefore, not within the actual limits of the improvement made by the extension of the street. But that was not necessary, in order that it should be benefited by the extension of the street. Such an extension would ordinarily benefit property and enhance its value, situated upon other portions of the street than those included within the limits of the improvement. And so far as such benefit extended, an assessment for the expenses of the improvement, could be equitably and justly extended; whether it should be assessed or not, was a matter confided, by the express terms of a preceding statute, to the judgment and discretion of the commissioners.‡ The only restriction imposed upon them, in that respect, was that which prohibited them from extending their assessment, for benefits derived from the improvement, beyond half the width of the block toward the next street or avenue from the street opened, straightened or improved. Assessments for benefits derived by property, situated upon the same street, can very properly be extended as far from the locality in which the improvement may be made, as its benefits may be actually enjoyed. How far that may be, must be necessarily confided to the judgment of the commissioners, so long as all reasonable bounds are not exceeded by them; and no reason exists for supposing that to have been done in the assessments made upon the plaintiff's property.

As the improvement was fully provided for by the act of 1867, and the proceedings taken, conformed to it, though not instituted within the time when it was rendered the duty of the corporation counsel to commence them, they were valid and effectual without any resolution of the common council; and the omission to publish it, as the law requires in other cases, in no way impaired the

* 19 Barb., 559.

† 2 Robertson, 153.

‡ Laws of 1816, p. 77, § 1.

authority which the statute provided for extending the street ; and there being no want of authority in the commissioners to assess the plaintiff's property, fronting upon the same street, for the benefit received by it from the improvement, no facts are shown by the complaint which will enable the plaintiff to maintain the present action. The order sustaining the demurrer was right, and it should be affirmed, with costs.

DAVIS, P. J., and DONOHUE, J., concurred.

Order affirmed, with costs.

ADDISON P. SMITH, RESPONDENT, v. THE MAYOR, ETC.,
OF THE CITY OF NEW YORK, APPELLANT.

Statutes—construction of—salary of police justice.

In 1860, the duties of the police justices of the city of New York having been increased, the legislature enacted that, "for the additional duties imposed by this act, the common council or board of supervisors in said city and county, may increase the compensation of any officer mentioned herein," and, under this authority, the common council, in 1862, advanced the salary of the police justices to \$5,000 a year. *Held*, that by thus advancing the salary, the authority created by the statute was exhausted, and both the common council and the board of supervisors were from that time powerless for further action in the premises ; and that a resolution of the common council, passed in December, 1869, providing that their salary should be still further advanced to the rate paid to the city judge, \$10,000 a year, was void.

In 1870, the legislature enacted, that "the mayor and comptroller are hereby authorized to fix the salaries of the civil justices of said city, not exceeding the salary now paid to the police justices of said city." *Held*, that the unauthorized increase of the police justices' salaries, was not thereby legalized.

APPEAL from a judgment in favor of the plaintiff, recovered on a trial before the court.

The facts appear in the opinion.

John A. Strahan, for the appellant.

Elbridge T. Gerry, for the respondent.

DANIELS, J. :

The judgment appealed from, was recovered by the plaintiff, as the assignee of James E. Coulter, one of the police justices of the city of New York, whose official term commenced on the 1st day of January, 1870; and it was rendered for the amount unpaid the assignee at the yearly salary of \$10,000, for the year ending on the 1st of September, 1872. The recovery was resisted by the defendant, on the sole ground that the assignor was by law restricted to the salary of \$5,000; and whether he was or not, is the sole point required to be considered upon the present appeal.

In 1860, certain additional duties were imposed upon the police justices of the city of New York, and for that reason it was then enacted that, "for the additional duties imposed," "the common council or board of supervisors in said city and county," might increase the compensation of those officers.* Under this authority, the common council of the city advanced the police justices' salary to the sum of \$5,000 in the year 1862.

This authority, by the terms of the act, was conferred to meet what was deemed to be a particular exigency, requiring the performance of but one single act. The object was to render the salary adequate as a compensation, for the services required to perform the increased duties assigned to the officer by the provisions of that statute. Those duties were at once apparent from the terms contained in the law, and it required but one act to adjust the compensation reasonably due for their performance. By that act, it was contemplated that the compensation would be rendered reasonably sufficient, and when it was performed, it was undoubtedly supposed by the common council, that entire justice had been done in that respect. The object to be accomplished, required it should be performed at once; not that partial justice in this respect should be done at one time, and the performance of the full duty completed at another. It was not an authority to increase the compensation from time to time, but to adjust it in such a manner as would render it consonant to the changes then made by the law; and duty to the officer, as well as the plain intent of the law, contemplated but one increase for that purpose. These are matters which have been ordinarily maintained under the authority of the legisla-

* Laws of 1860, 1014, § 26.

ture; and no reason exists for supposing that such a change in the system was designed, as would follow a complete relinquishment of that authority. The fair import of the act, as well as the purpose designed to be effected by this provision, is opposed to so broad a construction of its terms. In this respect, it was similar to the authority conferred upon commissioners to make an assessment, in the case of *Williams v. Haines*,* which was held to be exhausted when that act was performed, although it proved to have been illegally done.† And the case of *People v. Woodruff* ‡ maintains the same construction. By advancing the salary to the sum of \$5,000, the authority created by the statute was exhausted, and both the common council and the board of supervisors were, from that time, powerless for further action in the premises.

After that authority had been exhausted by its appropriate exercise, and in May, 1869, the common council was prohibited from increasing the salaries of persons then in office, or their successors, except as provided by acts passed by the legislature.§

But, notwithstanding the fact that the authority, given by the act of 1860, had been exhausted by the application and use of it, and the prohibition to the contrary, contained in the act of May, 1869, the common council did, in December of that year, provide, by resolution, that the police justices' salary should be still farther advanced to the rate paid to the city judge, which was \$10,000 per year. This seems to have been a plain, unwarrantable usurpation of power, and the act, for that reason, was utterly void.

In April, 1870, it was enacted that the mayor and comptroller were authorized to fix the salary of the civil justices of the city, at an amount not exceeding the salary then paid to the police justices. | And, from that circumstance, this unauthorized increase in the salary of the police justices, is claimed to have been from that time legalized. The argument, though plausible, is not deemed to be sound. The law of 1870 dealt simply with the fact, not with the authority under which it had come into existence. No attention was devoted to the latter circumstance, neither was the amount paid mentioned or defined. But, whatever that might be,

* 40 N. Y., 587.

† Id., 592, 3.

‡ 83 N. Y., 355.

§ Vol. 2, Laws of 1869, 2183, § 11.

| Laws of 1870, vol. 1, p. 893.

whether authorized or not, that was to constitute the limit on the authority to be exercised under its provisions. Upon so grave a matter as the unlawful assumption of official authority, the practice of the legislature is to use plain words, when a design exists to ratify or confirm. The object of this enactment, was to confer authority on two of the corporate officers of the city, to adjust the salaries of its civil justices. And, according to the terms made use of, that was the only object entertained. To confirm the unauthorized act of the common council of the preceding year, required something beyond that—at least some terms indicating the existence of such a purpose. This act contains nothing from which that can be supposed to be within its spirit or design; and, for that reason, under well settled rules of construction, it cannot be comprehended by the law.

Courts are required to construe statutes, where no different intention is manifested, by their terms, and the subject-matter to which they relate, according to the ordinary and popular meaning of the language in which they are made. And what cannot fairly be maintained to be within the signification of those terms, is not to be deemed to be within the statute. These laws are made for the public, and are required to be obeyed by its members, and no other rule is consistent with the substantial performance of the duties required to be observed under their provisions.*

Under such a principle of construction, no well supported reason can be found for the conclusion that it was designed, by referring in this act to the fact of payment, to sanction and approve the authority on which the payment itself was made. Upon this subject, the comments of Judge DAVIES, in the decision of the case of the *People v. Woodruff* (*supra*), are peculiarly wise and appropriate. He there said that "It is a dangerous principle to imply power when it is not conferred by legislative authority in clear and distinct terms. It is always competent for the legislature to speak clearly and without equivocation, and it is safer for the judicial department to follow the plain intent and obvious meaning of an act, rather than to speculate upon what might have been the views of the legislature in the emergency which may have arisen. It is

* *Newell v. People*, 3 Seld., 9, 97, 98; *People v. Utica Ins. Co.*, 15 John., 858, 880.

wiser and safer to leave the legislative department to supply a supposed or actual *casus omissus*, than attempt to do it by judicial construction." *

Another objection to the construction of this statute, relied upon in behalf of the plaintiff, arises out of the circumstance that the confirmation of the act of the common council, in advancing the salary in 1869, was an object of a local legislative nature, and, as such, commonly, if not necessarily, made the subject of special legislative enactment. Certainly, such acts are not usually intended to be confirmed, when no expressions, indicating the existence of such a design, have been allowed to find their way into the law. Something more than a simple reference to the fact, unlawfully brought into existence, should be required to produce such a confirmation. If more than that be not required, then legislation is beset with risks, which, in this rapid age, must often be productive of injurious consequences, both to public and private interests. When such latitude of construction is adopted, as requires its support from conjecture and speculation, rather than the import of the terms employed in the laws, their administration will be rendered too uncertain to be consistent with the stability of substantial rights. The guide which safety, as well as reasonable uniformity, requires to be followed, is that which has been already mentioned of construing the laws by the ordinary signification of the terms made use of, without so far refining upon them as to exceed their meaning, in order to supply the necessities of some particular case.

The subject is not free from difficulty, as was well remarked by the learned judge before whom the trial was had. But the support supplied by the reference, made in the act of 1869, to the fact of payment, is altogether too shadowy in its nature to maintain the legality of the plaintiff's demand.

The additional circumstance, that the legislature, in 1870, made the appropriation large enough to include the increase of 1869, in no way improves the plaintiff's case. The same objections exist to the inference that, by doing so, the legislature intended to confirm the illegal act of the common council, as have already been

* 32 N. Y., 364.

mentioned in considering the other provision of the statute. If the appropriation had, in terms, provided that the police justices should be paid the salary of \$10,000, the case would be manifestly different from what it now is—an appropriation of a gross sum to pay salaries. The import of such an appropriation is, that the officers, who are to be paid out of it, are to receive what they have a lawful right to demand, and nothing beyond that. If the appropriation exceeds the sum necessary for that purpose, it does not follow that the officers, intended to be paid out of it, are entitled to have the excess divided between them.

The judgment should be reversed, and a new trial ordered, with costs to abide the event, unless the plaintiff consent, within twenty days, to reduce the recovery to the amount due at the rate of \$5,000 per year, and the allowance made in the same proportion. And in case such consent be given, then the judgment, as so modified, should be affirmed, without costs of the appeal.

DAVIS, P. J., concurred.

Ordered accordingly.

THE PEOPLE EX REL. J. WM. MCGOWAN, APPELLANT, v.
WILLIAM J. HAVEMEYER AND OTHERS, RESPONDENTS.

THE PEOPLE EX REL. JAMES DUNPHY, APPELLANT, v.
THE SAME, RESPONDENTS.

THE PEOPLE EX REL. A. J. FULLERTON, APPELLANT, v.
THE SAME, RESPONDENTS.

*Chapter 779 of Laws of 1873—board of estimate and apportionment created by—
when its power to revise estimates of preceding board, ceased.*

The power of the board of estimate and apportionment, created by chapter 779 of the Laws of 1873, to reconsider, revise and redetermine the estimate already made for that year, ceased on the 1st day of July, 1873.

THE appeals in these cases, are taken from orders denying motions for peremptory writs of mandamus, directing the respondents, as the board of estimate and apportionment, to convene,

audit and apportion the amounts due to the relators, for their salaries as messenger and deputy clerks of the board of supervisors of the county of New York.

The salary of the messenger accrued between August, 1871, and December, 1872; and the salaries of the deputy clerks, between the 1st of January, 1872, and the 1st of May, 1873.

Joseph H. Dukes, for the appellants.

Geo. P. Andrews, for the respondents.

DANIELS, J. :

As the claims made by the relators all accrued by the 1st day of May, 1873, the latest of them should have been included in the estimate of county expenses for that year.

By chapters 573 and 583, of the Laws of 1871, the county expenses for the years 1871 and 1872, were required to be estimated and apportioned within twenty days after the first day of May of the first year, and on the first day of May of the second year. But this date was afterward extended as far as the 20th day of May, 1872.* By section 2 of chapter 573, of the Laws of 1871, the estimates of each year, after 1872, were required to be made by the first day of December of the preceding year. By force of these statutes, and the provisions contained in them, requiring the estimates to comprehend the yearly county expenses, for which each should be made, as a portion of those expenses, the relators' salaries should have been included in the estimates, made before the enactment of chapter 779, of the Laws of 1873, creating the board constituted by the respondents. So much of the salaries as would accrue and become payable in any one year ought, under the provisions of the law relating to that year, to have been included in the estimate made for its expenses.

That was plainly the duty of the officials required to make those estimates. When the new board was created, on the 14th of June, 1873, all the estimates had been made into which the relators' salaries should have entered. And the persons required to make them, had neglected to estimate any amount for the payment of

* Vol. 1, Laws of 1872, 1050, § 2.

those salaries. It was to supply the omission arising out of that neglect, that the present proceedings were instituted.

For the purpose of sustaining them, it was shown that two of the relators, on the 18th day of July, and the other, on the 11th of August, 1873, made demands, in writing, on the respondents that they should forthwith convene, audit, allow and apportion the amount due to each of them, respectively, for their unpaid salaries.

These demands must have been designed to require the respondents to allow and include these salaries in the estimates already made by the preceding board for the year 1873, for they were not required to make their estimates, for the year 1874, until the 1st of December in the year 1873. For that purpose, they could not be required to convene, as the relators demanded they should. And if the demands were designed and understood to require the respondents to convene, and enter upon the making of their estimates for the year 1874, the fact that the time had not then arrived when they were required by the statute to do that, would constitute a complete answer to the demands served.

There is no good reason for supposing that to have been the relators' purpose, or the understanding the respondents had of it.

If that had been the purpose of the demands, they would simply have required the respondents, to include the unallowed salaries in the estimates which should be made by the board for the year 1874.

The object which the relators undoubtedly designed to secure, by requiring the respondents forthwith to convene for the purpose mentioned by them, was the incorporation of their claims in the estimates, made by the preceding board for the year 1873. But for that purpose, their demands were made at too late a period. For while the act of 1873 empowered the board, constituted by the respondents, to reconsider, revise and redetermine the estimate previously made for that year, it only allowed that to be done at some time prior to the 1st day of July, 1873.* The language of the section is such as to show that the time mentioned in it, was intended to form a limit beyond which the estimate made in the preceding year, should not be interfered with.

They were allowed to act upon this subject from time to time,

* Laws of 1873, 1186, § 2.

audit and apportion the amounts due to the relators, for their salaries as messenger and deputy clerks of the board of supervisors of the county of New York.

The salary of the messenger accrued between August, 1871, and December, 1872; and the salaries of the deputy clerks, between the 1st of January, 1872, and the 1st of May, 1873.

Joseph H. Dukes, for the appellants.

Geo. P. Andrews, for the respondents.

DANTELA, J.:

As the claims made by the relators all accrued by the 1st day of May, 1873, the latest of them should have been included in the estimate of county expenses for that year.

By chapters 573 and 583, of the Laws of 1871, the county expenses for the years 1871 and 1872, were required to be estimated and apportioned within twenty days after the first day of May of the first year, and on the first day of May of the second year. But this date was afterward extended as far as the 20th day of May, 1872.* By section 2 of chapter 573, of the Laws of 1871, the estimates of each year, after 1872, were required to be made by the first day of December of the preceding year. By force of these statutes, and the provisions contained in them, requiring the estimates to comprehend the yearly county expenses, for which each should be made, as a portion of those expenses, the relators' salaries should have been included in the estimates, made before the enactment of chapter 779, of the Laws of 1873, creating the board constituted by the respondents. So much of the salaries as would accrue and become payable in any one year ought, under the provisions of the law relating to that year, to have been included in the estimate made for its expenses.

That was plainly the duty of the officials required to make those estimates. When the new board was created, on the 14th of June, 1873, all the estimates had been made into which the relators' salaries should have entered. And the persons required to make them, had neglected to estimate any amount for the payment of

* Vol. 1, Laws of 1872, 1050, § 2.

those salaries. It was to supply the omission arising out of that neglect, that the present proceedings were instituted.

For the purpose of sustaining them, it was shown that two of the relators, on the 18th day of July, and the other, on the 11th of August, 1873, made demands, in writing, on the respondents that they should forthwith convene, audit, allow and apportion the amount due to each of them, respectively, for their unpaid salaries.

These demands must have been designed to require the respondents to allow and include these salaries in the estimates already made by the preceding board for the year 1873, for they were not required to make their estimates, for the year 1874, until the 1st of December in the year 1873. For that purpose, they could not be required to convene, as the relators demanded they should. And if the demands were designed and understood to require the respondents to convene, and enter upon the making of their estimates for the year 1874, the fact that the time had not then arrived when they were required by the statute to do that, would constitute a complete answer to the demands served.

There is no good reason for supposing that to have been the relators' purpose, or the understanding the respondents had of it.

If that had been the purpose of the demands, they would simply have required the respondents, to include the unallowed salaries in the estimates which should be made by the board for the year 1874.

The object which the relators undoubtedly designed to secure, by requiring the respondents forthwith to convene for the purpose mentioned by them, was the incorporation of their claims in the estimates, made by the preceding board for the year 1873. But for that purpose, their demands were made at too late a period. For while the act of 1873 empowered the board, constituted by the respondents, to reconsider, revise and redetermine the estimate previously made for that year, it only allowed that to be done at some time prior to the 1st day of July, 1873.* The language of the section is such as to show that the time mentioned in it, was intended to form a limit beyond which the estimate made in the preceding year, should not be interfered with.

They were allowed to act upon this subject from time to time,

* Laws of 1873, 1186, § 2.

and at any time prior to the first day of July, clearly implying that it was not intended that they should take any action in that respect after that time. The nature of the proceedings was such as to render the time mentioned important, as a limitation upon the exercise of the authority conferred over the preceding estimate. For that was afterward to be certified by the comptroller to the board of supervisors, to be levied and collected in the year 1873, upon the real and personal estate within the city and county of New York. These subsequent proceedings contemplated that the duties of the respondents with that estimate, would be completed by the time mentioned in the section. Any other construction would permit the indefinite extension of the time, within which they might reconsider, revise and redetermine the preceding estimate.

If they could so far extend the time, as to comply with the demands made by the relators, they could continue to do so in order to comply with other demands, until no part of the year would be left, within which the the estimate could be certified to the supervisors, for the purpose of enabling them to proceed in levying and collecting the taxes.

In this proceeding, time must have been intended as an essential attribute of the act allowed to be performed. For, in no other view, could the purposes provided for, be certainly accomplished. The statute not only permitted the respondents to reconsider and revise the estimate made for the year, but it required that to be done, if done at all, by the first day of July. That the time prescribed was intended to be a positive limitation of the power to be exercised, is further shown by the act of 1872, already referred to.

For, by the preceding act of 1871, the board was required to meet and make estimates, for 1872, on the first day of May of that year.* An extension of that time was, for some reason, found to be desirable, and the legislature made it for a period of twenty days.†

It would be unreasonable to suppose that legislation would have been resorted to for the purpose of extending the time, if that which had been previously specified, had not been intended to define the period, within which the estimate was required to be made.

* Vol. 2, Laws of 1871, 1869, § 8.

† Vol. 1, Laws of 1873, p. 1050, § 2.

These acts all relate to the same subject-matter, and a consideration of all their provisions is proper, for the purpose of ascertaining and determining the intent of each particular enactment. The language of the act of 1873, the proceedings afterward to be taken on the estimate within that year, as well as this legislative construction of the previous provision as to the time within which another estimate should be made, combine to support the conclusion that no reconsideration or revision of the estimate could be made by the respondents, after the time prescribed for that purpose had passed. For that reason, the respondents had no power to comply with the demands made upon them by the relators.

They could not then lawfully convene to audit, allow and apportion the relators' unpaid salaries, and the motions made by them were properly denied.*

The same disposition was made of a similar application, against the respondents, by both the Special and General Terms of the Court of Common Pleas of the city of New York, in the case of Patrick McMullen. And no reason appears to exist for doubting the propriety of that decision.

If the relators have the legal right to have the amounts due to them, which should have been included in preceding estimates, incorporated in the estimate of the respondents, they must be provided for by an estimate hereafter to be made.

The orders appealed from appear to have been made on the 12th day of December, 1873, when, if the writs applied for had been awarded, the respondents had no power to obey their mandate.

For, by that time, their power over the estimate of 1873 had expired by lapse of time, and the estimate for 1874 had been completed, if the duty prescribed by the statute had been observed.

And it may be presumed to have been performed as the law required it should be, since nothing to the contrary appears in these cases.

The orders were right, and they should be affirmed.

DAVIS P. J., and LAWRENCE, J., concurred.

Orders affirmed.

* *Clark v. Norton*, 49 N. Y., 243.

ABRAHAM MESEROLE AND OTHERS, APPELLANTS, v. ARCHIBALD K. MESEROLE AND OTHERS, RESPONDENTS.

Will—trust—suspension of power of alienation—accumulation.

Where the testator, having devised property, both real and personal, to trustees, to receive the rents, issues and profits thereof, divided the same into fourteen equal parts, and directed that the rents, profits and income of each part should be paid over to different persons named in the will, the trust, as to each part, to terminate upon the expiration of two lives in being at the time of the testator's death, *held*, that the fact that the due execution of the trust would require some of the parts to remain in the hands of the trustees after the trust had terminated, and the ultimate right vested, as to them, did not invalidate the trust by creating an unlawful suspense of the power of alienation.

The testator directed that a portion of the rents, incomes and profits of certain of the shares, which were given to minors, should be accumulated during their respective minorities, and, upon their expiration, the accumulation of each share should be added thereto, and the rents, incomes and profits of the shares, thus augmented, paid over to the respective beneficiaries. *Held*, that the direction was valid; that the law does not require the accumulation to be paid over to the beneficiary upon the termination of his minority; and that it is sufficient if it be for his benefit.

Whether or not the heir at law can maintain an action for the purpose of procuring a construction of the testator's will, *quere*.

Seemle. That the right to maintain such an action in equity, is limited to the executors or trustees themselves, and the persons specially authorized to do so, under the act of 1853.

APPEAL from a judgment in an action, brought to obtain the construction of the will and codicil of Abraham Meserole, deceased.

The testator left two children, his son, Jeremiah V. Meserole, and his daughter, Maria M., wife of William K. Knapp, and three grandchildren, the plaintiffs in this action, children of David M., a son of the testator.

By the provisions of the will, after the bequest of several legacies, including \$10,000 to each of the plaintiffs, the testator gave the residue to, and for the use of, the other two children and their families. The facts are stated in the opinion.

Alvin C. Bradley and *M. L. Townsend*, for the appellants.

E. Moore and *T. J. Jackson*, for the respondents.

DANIELS, J.:

The testator left an estate of considerable magnitude, consisting of real and personal property.

After the bequest of several legacies, concerning the validity of which no controversy exists, the testator gave, devised and bequeathed the residue and remainder of his real and personal estate to three executors, to take possession and hold the same, and receive the rents, issues, profits and income thereof, in the several shares and proportions, and for the respective periods afterward mentioned. He then directed that three equal fourteenth parts should be held by them for and during the natural life of his son, Jeremiah V. Meserole, two for his daughter-in-law, Evelina, wife of that son, one for Alfred V. Meserole, the son of his own son, one for Abraham Meserole, another son of his own son, three for his daughter, Maria M. Knapp, one to each of her three daughters, and the remaining equal fourteenth for the life of his grandson, John Meserole Knapp.

The same substantial directions were given by the testator, concerning the three shares provided for his three children. They are, that the rents, profits and income, arising from each share, shall be paid over by the executors, to the beneficiaries respectively, for the support of themselves and their families respectively. And the directions given, are also identical, concerning each of the one-fourteenths, given by him to the executors for each of his six grandchildren. They are, that the executors should apply \$1,000 each year for the support, maintenance and education of each grandchild, during the period of his or her minority, out of the rents, profits and income of the share, required to be held by them for the use of such grandchild.

The residue of the income of the share of each grandchild, to be accumulated during the period of the minority of the grandchild, from whose fourteenth the same shall be derived. And as each shall attain his or her majority, then, from that period, the entire rents, profits and income of his or her fourteenth, and of the accumulations added thereto under the preceding direction, are to be paid over to each respectively, for his or her support and maintenance, during the residue of his or her respective life.

At the decease of the testator's son, Jeremiah V. Meserole,

whether before or after his own death, the three-fourteenths parts of the rents and profits, provided for him as his share for life, are required to be divided by the executors, into four equal shares, and kept safely invested by them, and the interest and income from two of them, paid over to the testator's daughter-in-law, Evelina Meserole, during her life. And at her decease, the two shares themselves are directed to be divided and paid over, among and to the lawful heirs of the testator's son, Jeremiah V. Meserole, in the same proportions as if he had died intestate and possessed of such shares.

The other two shares, created out of those fourteenths, the executors are required to invest, one for each of the two sons of Jeremiah V. Meserole, and to pay over the interest and income of the share, invested for each of such sons, to him during his natural life.

And on either's decease, all the property and money, held in trust for him under the terms of the will, are directed to be divided and paid over among, and to his lawful heirs. And if either of such sons shall die before his father or mother, then the share he would otherwise have been entitled to, upon the decease of his surviving parent or parents, is directed to go to the lawful heirs of Jeremiah V. Meserole.

Upon the decease of the testator's daughter-in-law, Evelina, the two-fourteenths of his estate, provided for her benefit for life, are directed to be divided into five equal shares. Three of them to be invested for, and the interest and income from the same paid over to, his son, Jeremiah V. Meserole, during his life. And at his death, the shares themselves divided between, and paid over to his lawful heirs. The other two of these five shares, are directed to be invested for the benefit of the two sons of Jeremiah V. Meserole, one for each, and the income and interest of each share, paid over to the person for whom the investment is directed to be made, during his natural life.

The final distribution of the two shares, as the persons entitled to their income and interest may respectively die, is directed to be made among the lawful heirs of the testator's son, Jeremiah V. Meserole, by the provision, already considered in another connection, on that subject.

At the decease of the testator's daughter, Maria M. Knapp, the

three-fourteenths of his estate, the rents, issues and profits of which are given to her for life, are required to be divided into four equal shares and invested, one for each of his grandchildren, Maria M., Evelina M., Katie L., and John Meserole Knapp; and the income and interest of such share, paid over to the person for whom the investment is required to be made, during his or her natural life. And at the time of the decease of either of those four persons, if that should not occur during the life of their mother, Maria M. Knapp, the share provided for the person dying, is given to his or her lawful heirs, absolutely. But if either should die before their mother, then the fourth of the three-fourteenths, provided to supply her share of rents, income and profits, is directed to be divided among her lawful heirs. And upon the decease of either of these four grandchildren, the fourteenth of the testator's estate, directed by the will to be held in trust by the executors for each of them respectively, is absolutely given to his or her lawful heirs.

These provisions effectually dispose of all the residuary estate, directed by the testator to be held in trust by his executors, if they are not in conflict with the provisions of the statutes, limiting the period within which the power of alienation and absolute ownership of property may be suspended.

The testator, very clearly, designed to dispose of his real and personal estate by the provisions contained in his will, and to avoid intestacy as to any portion of it. And if the directions given by him are valid, that object has been accomplished. From the analysis, made of the directions contained in the will, concerning the disposition of the residue of the testator's estate, it is apparent that the trust created in the rents, issues, income and profits of neither one of the shares provided for, can extend beyond the duration of two lives in being at the time of his decease. And the lives, by which the most extended limitations are restricted, are those of the two beneficiaries themselves; eight fourteenths, constituting three specific shares, can only continue until the end of the two lives, for the benefit of which each share is created. For, by the division which it is provided shall be made of these three shares, as the life tenants of the rents, income and profits of each, may die, no portion into which the share itself is directed to be

divided, can extend beyond the life of the person who is to receive its rents, income and profits, after such division may be made of it.

The other six fourteenths are still farther restricted. For, as each life tenant of a fourteenth part of the rents, income and profits, may die, the trust in the share of such person will at once cease to exist, according to the terms of the will, and it will become the absolute property of the lawful heirs, who, it is provided, shall receive it when the trust created in it shall end.

The testator's scheme was, evidently, to avoid the unlawful suspension of the power of alienation and absolute ownership, in the trusts created in the residue of his estate. And to accomplish that result, while he gave the entire residue in trust to his executors, with full authority to continue and hold it together as one mass, he divided and disposed of the rents, issues and profits, issuing from the same, in such a manner that the existence of no share provided for, could, by any possibility, transcend the statutory period.

But it is claimed, that, as portions of the mass of the estate must necessarily remain in the executors' hands, to supply the purposes of the trust, for a greater period than the duration of two lives, in being at the creation of the trust, the disposition should be held to be unlawful. That consequence would have proved the same, if a legal, as well as equitable division of the estate, had been made.

For some shares, even then, would have extended through the existence of many lives, in point of fact. But the statute does not render the disposition unlawful on account of that circumstance, as long as the beneficial interest, itself, must determine with the lives of the two persons, who are to successively enjoy the same interest.

In such a disposition of the testator's property, although the executors hold it as one entire mass, an equitable division of it is made among the persons who are to receive defined and specific portions of its rents, income and profits.

Each beneficiary becomes, for the time being, the equitable owner of that portion of the estate from which his or her rents, income and profits are derived, and the property held in trust, is, to that extent, held solely for the person benefited by so much of the trust.

It seems to have been supposed that the present case should be distinguished from those settling this principle, by reason of the

fact, that, in them, the testator designed to have his estate changed into personalty, for the purposes of the trust. But that could make no difference in the principle to be applied. For, if realty, held as one mass in trust, would violate the provision of the statute, prescribing the limits beyond which the power of alienation cannot be suspended, the illegality could not be avoided by simply changing it into personalty, and, in that form, holding it for the same time in one similar mass.

If the trust would be void, as one affecting real estate, the same consequence would follow from the suspension of the power of absolute ownership, in case it should be converted into personalty, and the product were required to be held in trust for the same period of time. A change in the form of the property, supporting the trust, would not essentially change the principle applicable to it in this respect.*

The principle governing both classes of cases must be, in substance, the same, from the similarity of the provisions contained in the statutes relating to them. Consequently, such a separation and division of the equitable interests in the rents, income and profits, as have been held to constitute a valid disposition of the testator's personal estate, must be attended with the same result, when they are made in the rents and profits of real estate. And, under the authorities existing on that subject, it would seem to follow that the disposition which the testator made in this instance, was a lawful and proper one, so far as the objection now under consideration, has assailed its validity.†

The persons, to whom the shares in the rents, income and profits of the testator's residuary estate, were given for life, took several interests by the direct provisions of the will.

These interests were in the nature of equitable estates in specific shares of the residue held by means of the intervention of the trust created for the individual benefit of each, rendering them equitably tenants in common for life in such residue. In effect, the estate was as completely divided between them, as though given to them in direct terms as tenants in common. For, in theory, that was

* 8 R. S., 5th ed., 11, §§ 15, 16; id., 75, § 1.

† Tucker v. Bishop, 16 N. Y., 402; Savage v. Burnham, 17 id. 561; Gilman v. Reddington, 24 id., 9; Everitt v. Everitt, 29 id., 39.

the substantial nature of the interests, they were severally intended to derive under the terms of the will.

The accumulation of the rents, income and profits of the shares, given in severalty to the testator's grandchildren, was limited by the expiration of the minority of the respective minors, for whose benefit it was directed. And the direction in that respect was not unlawful, because the fund, accumulated during the period provided for, was to be added to the principal of the minor's interest in the equitable estate.

The statute nowhere prohibits such a disposition of the accumulated fund. It simply requires that it shall be for the benefit of the minor, and terminate at the expiration of his or her majority. And that purpose is as clearly and literally observed, where the amount accumulated, is to be added to the principal of the minor's interest, as it would be in case it were required to be paid over to him upon attaining his majority. But if it were not equally as beneficial, that would constitute no valid objection to the validity of the direction. For all that the statute requires, is, that the accumulation shall be for the benefit of the minor, and terminate with his minority. And that object is secured where it is added to the principal, from which he is afterward to receive the interest and income.*

It is unnecessary to consider the effect of the power of sale given to the executors, by which they were authorized, and for some purposes it may have been contemplated that, under it, they might find it necessary, to convert the realty into personalty. For it was optional merely, and never exercised by the executors. Neither can it be important to examine the effect, attributable to the acts of the plaintiffs in accepting and receiving, without objection, the legacies provided for them by the will of the testator, nor the question whether the plaintiffs, as heirs-at-law, can properly maintain an action for the purpose of procuring a construction of the testator's will, or the judgment of the court on the validity of the provisions contained in it, for the disposition of his residuary estate.† The right to maintain such an action in equity, will probably be found to be limited to the executors or trustees them-

* 8 R. S., 5th ed., 18, § 87; id., 75, § 8.

† Bailey v. Southwick, 6 Lansing, 356, 362, 363.

selves, and the persons specially authorized to do that under the act of 1853.*

The judgment, pronounced in this case by the Special Term, was right, and it should be affirmed.

DAVIS, P. J., and DONOHUE, J., concurred.

Judgment affirmed, with costs.

THE PEOPLE EX REL. JAS. C. DANIELS AND ANOTHER v.
FREDERICK CUSHMAN, RESPONDENT.

Landlord and tenant—when relation exists—variance in proof—when fatal.

The respondent instituted proceedings, under the landlord and tenant act, to have the relator removed from a certain portion of a pier in New York, described in the complaint by metes and bounds. At the trial, there was no proof of any lease of the particular premises described. *Held*, that the variance was fatal.

Where the relators, who were entitled to use a pier for loading and unloading canal boats, agreed to pay the respondent, the lessee of the pier, fifty dollars a month for the privilege of placing a derrick, scales and office upon a certain portion thereof, *held*, that this did not create the relation of landlord and tenant, and that, upon the termination of the agreement, they could not be dispossessed under the landlord and tenant act.

CERTIORARI to the justice of the District Court, of the first judicial district of the city of New York, to examine an adjudication made by said justice, under the statute authorizing summary proceedings. The facts are stated in the opinion.

D. McMahon, for the relators.

Benedict, Taft & Benedict, for the respondent.

DAVIS, P. J. :

The relators are agents of a line of canal boats, known as "The Seneca Falls Line." The harbor-master in charge of "Pier 4, East

* General Statutes of N. Y., vol. 4, 508.

river," had assigned to the boats of said line, a portion of said pier as their berth, at which such boats were accustomed to load and unload.

The respondent was the lessee of the pier, and claimed by his affidavit, duly presented to the justice of the District Court for the first judicial district, that the relators were holding over, after the expiration of a lease from him to them, of "a portion of the wharf or pier known as Pier 4, East River, in the city of New York, for the purpose of erecting and maintaining thereon a derrick, a building or office, and a scale, which portion of said wharf or pier is particularly described as follows: Beginning at a point on the westerly side of said pier, distant about one hundred and thirty-three feet six inches from the bulk-head line, and running thence easterly and parallel with said bulk-head line, ten feet; thence northerly, at right angles to said bulk-head line, twenty-eight feet; thence westerly and parallel with said bulk-head line, ten feet; and thence southerly, and at right angles to said bulk-head line, twenty-eight feet, to the place of beginning."

The respondent alleged, that on or about the 12th of April, 1871, he leased the above described premises to the relators, for the term of one year, commencing on the 12th day of April, 1871, and ending on the 12th day of April, 1872, unless said term should be sooner terminated by notice. The proofs given in the case, tended to show that the relators, as agents of the line above named, had used the pier, at the berth assigned to their boats, for receiving and discharging cargoes from their boats, for many years. That a derrick for unloading the boats, consisting of a pole inserted in the pier, and a swinging arm with appropriate tackle, had been maintained and used for some twenty-five years; and that, in 1871 and 1872, the relators used also a platform scale, on wheels, for weighing freight when necessary, and a small covered structure on wheels, four or five feet square, with a desk in it, at which a man could stand in rainy weather, to take tallies of the cargoes loaded or discharged. The respondent gave evidence tending to show, that, for the privilege of using these things on the pier, the relators, in 1871, agreed to pay, and did pay, the sum of fifty dollars per month, which payments were made up to the time when the canal boats ceased to use the pier, in the fall of 1871. In 1872,

the relators refused to pay, and hence the proceedings were instituted against them, as tenants holding over after the expiration of their lease.

The material allegation of the complaint, is the leasing of a certain described portion of the pier, of which metes and bounds are given, and the unlawful holding over of that portion, after the expiration of the lease; and the justice has found in accordance with the allegation, and given judgment that the relators be dispossessed of the premises so described. There was no proof of any lease of the particular premises described in the complaint. The variance in that respect was fatal. The derrick and scales and office (if it be so called) were probably used within the metes and bounds set out in the complaint, but there was a total failure to prove any lease of the pier within those metes and bounds. The utmost that can justly be said of the proof, is, that it showed that, in 1871, the relators had agreed to pay fifty dollars a month for the right or privilege of using those particular conveniences, on that part of the pier where the berth, assigned to their boats, required them to be used. That agreement did not operate as a lease of the premises, described by metes and bounds in the complaint. Those premises, the relators had a clear lawful right to use as a part of the wharf or pier, for the purpose of loading and unloading their boats, they paying the lawful wharfage therefor to the respondent, or to the party entitled thereto. It appears that the wharfage was paid. The relators could not, therefore, be dispossessed of the portion of the wharf described, under the landlord and tenant act, because they used utensils and implements on such part, different from those which they had a right to use as proprietors or agents of the boats lawfully occupying the berth.

If the use of a derrick, and the scales and office, were unlawful, or without right, the relators might, perhaps, have been treated as trespassers by the owner or lessee of the pier, but, as it seems to us, clearly not as tenants, to be removed under the landlord and tenant act. Considering the agreement of 1871, as at most under the evidence it was, as permitting, for a stipulated price per month, the use, on a portion of a public wharf, of the above described conveniences for loading and unloading, and that the relators' sole right to use them, depended upon the agreement, there certainly

would not spring up the relation of landlord and tenant, entitling the former to remove the latter, on the expiration of the agreement, from the premises on which the conveniences had been used. There must be a letting of the realty, itself, to constitute such relation, and not a mere contract with a party who has a right to use and occupy for a lawful purpose, such as loading and unloading vessels at the piers of the city, giving a privilege to use on the piers, utensils and machinery belonging to himself. Indeed, the proceeding in this case was not aimed, in fact, to remove the relators from the premises described, but to take off the tools or conveniences used by them, still leaving them in occupancy, as far as necessary for loading and unloading their boats, in some other manner. The judgment, however, goes so far as to dispossess them wholly of the portion of the pier described. We are of opinion that the statute, giving summary remedies to landlords against tenants holding over without permission, has no application to the case. For that reason, and on the ground of fatal variance between the complaint and the proofs, the proceedings must be reversed.

DANIELS and DONOHUE, JJ., concurred.

Proceedings and judgment reversed.

HORACE B. FROUDE, APPELLANT, v. EMILY L. FROUDE,
RESPONDENT.

Commission rogatory.

The plaintiff applied to the court for a commission to be issued to the French courts, to enable him to examine two witnesses orally, on the ground that one of the witnesses had already been examined on commission, and, as he claimed, testified falsely, and that he feared the other would do so. *Held*, that the application was properly denied. The mode of taking testimony abroad, is established by the Revised Statutes, and it is not to be departed from, unless the court cannot otherwise obtain the testimony.

APPEAL from an order denying an application made by the plaintiff for a commission rogatory, to take the testimony of two

witnesses residing at Nice, in France. The facts are stated in the opinion.

Chas. E. Whitehead, for the appellant, cited *Lumley v. Gye* (3 Ellis & Black., 114); *Clay v. Stephenson* (7 Ad. & Ellis, 185); *Boelen v. Melladew* (10 Com. Bench, 898); *Pongford v. O'Connor* (5 Mees. & Wels., 673); *Fisher v. Izatary* (1 El., Black. & El., 321); *Pole v. Rogers* (3 Bing., N. C., 780); *Nelson v. The U. S.* (Peters' C. C. R., 235).

Jos. Larocque, for the respondent.

DONOHUE, J.:

In this case, the plaintiff applied to the court below, to allow him to examine two witnesses abroad, under a commission to be issued to the French courts, at the place of residence of the witnesses, to procure such examination orally; the reason given, being that one of the witnesses had already been examined, and, as claimed, testified falsely, and the other, it is apprehended by the plaintiff, would do so. The court below denied the application, and from that order the plaintiff appealed. I think the court below was right. The Revised Statutes* fix the mode of taking testimony abroad, and the cases cited by the plaintiff, as well as defendant, establish the rule that this is not departed from, unless the court cannot otherwise get the testimony. *Lincoln v. Battelle*† is a case in point.

The cases cited from the English reports, must be viewed in the light of the English rule, which has always been averse to taking testimony except in presence of the parties, and has always appeared to excuse itself when adopting testimony taken in any other way. Hoffman's Chancery Practice lays down the rule, as practiced here in equity cases.‡ To adopt the cumbersome and expensive rule of the English courts on this subject, or open commissions, would be to subject parties to disastrous delays and expenses. If the rule were adopted, whenever a party thinks his testimony could be better taken by such commission, he could

* Part 3, chap. 7, title 3, art. 2.

† 6 Wend., 475.

‡ Page 481.

have it. His opponent would, at his peril, have to accompany them, and perhaps find, when he had gone to such country as his opponent desired to send him, and had incurred the expense of employing counsel, that no witnesses were produced. Again, to adopt this system, would be to subject all our causes to the rules of evidence and mode of examination under the laws of each particular country to which the commission would go.

In this case, the facts show that no difficulty exists in obtaining the execution of a commission in our own form; it has been done in this case, and no pretense exists that it cannot be done as to the other witness. The mere statement that they expect in this way to get different testimony, is not enough.* Should the witness, already examined, testify differently, the testimony would be worthless, and, as to the other, such fact is not to be presumed.

Again, it is a question, in the absence of all settled form of taking the testimony in our courts, whether we are prepared to sanction the mode of taking testimony, adopted in some cases, under the civil law.

The order appealed from should be affirmed.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed.

JOSEPH E. PAINE, RESPONDENT, v. EDWARD D. McCARTHY, APPELLANT.

Service of summons without complaint—judgment on failure to appear.

On the seventeenth of June, a summons, without a copy of the complaint, was served on the defendant, and on the nineteenth, a copy of the complaint was left at his office; the defendant having served no notice of appearance or put in an answer, the plaintiff, on the eighth of July, entered judgment. *Held*, that the judgment was regular.

APPEAL from an order made at Special Term, denying a motion made by defendant to set aside the judgment entered in the

* 1 Barb. S. C. R., 290.

action, but allowing him, on certain conditions, to come in and defend.

Edward D. McCarthy, in person, for the appellant.

James E. Bedell, for the respondent.

DONOHUE, J.:

In this case, on the seventeenth day of June, the defendant was served with a summons, neither accompanied by, nor required to be accompanied by a complaint.

The defendant having served no appearance or answer before the eighth of July, the plaintiff entered judgment.

The defendant now claims that this judgment should be set aside as irregular, on the ground that the plaintiff served a complaint at defendant's office on the nineteenth of June, and the defendant's time to appear and answer did not expire until the ninth of July, on which day he served an answer.

The judge below denied defendant's motion, but gave him liberty, on certain conditions, to come in and defend. We think the order correct. Section 130 expressly shows that, to entitle the defendant to a copy of the complaint, he should appear within the twenty days after service of the summons, and that the complaint need not accompany the summons.

This construction has been given by the court.* We think the defendant has no cause of complaint against the order, as, in strictness, the plaintiff was correct, and defendant's motion might have been denied.

The order should be affirmed.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, with costs.

* *Van Pelt v. Boyer*, 7 Howard, 325.

ROBERT A. SINCLAIR, RESPONDENT, v. JAMES NEILL AND
OTHERS, APPELLANTS.

Rescission of contract—when allowed—power of referee to allow amendments to complaint.

The plaintiff was induced by fraudulent representations, made by the defendants, to purchase, in February, a store of goods, together with the fixtures and the leases of the property, for \$4,000; in payment of which he gave two notes, made by himself, for \$500 each, and a bond and mortgage, which he had procured to be executed, for the residue. The plaintiff took possession of the store, disposed of the goods and collected the rents, until the twenty-second of May, when he discovered the fraud; offered to restore the goods then unsold, the fixtures and the leases, and, his offer not being accepted, he then disposed of the residue of the goods. This action was brought to rescind the purchase, and procure a return of the notes and the bond and mortgage; *held*, that as he had put it out of his power to return what he had received by the purchase, he could not rescind the contract. In order to entitle a party to rescind a sale or purchase of property, on account of fraud, he must be able to restore and return what he himself has received. Where that cannot be done, the fraudulent transaction cannot be annulled.

At the trial, the plaintiff applied to the referee for leave to amend the complaint by alleging that he had sustained damages, by reason of the false and fraudulent representations contained in the complaint, to the amount of \$5,000, and demanding a recovery of such damages; and that the same, because of the vendor's insolvency, should be declared a lien upon any amount found due from him on account of the sale. The referee permitted this amendment to be made against the objection of the defendants; *held*, that this was error; that the amendment introduced a new and independent cause of action into the case, not within the issues referred to the referee to try; that the referee should have suspended the trial, until relief could be obtained by special motion, on notice, before the court.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee. The facts are stated in the opinion.

M. L. Townsend, for the appellants. The plaintiff, having put it out of his power to restore what he had received under the contract, cannot rescind it. (*Hogan v. Weyer*, 5 Hill, 389; *Van Epps v. Harrison*, id., 66; *Voorhees v. Earl*, 2 id., 288; Story on Con., § 844, note *a*; Chit. on Con., 6 ed., p. 815, note *c*; *Minturn v. Main*, 3 Seld., 227; *Cobb v. Hatfield*, 46 N. Y., 533; *Springer v. Dwyer*, 58 Barb., 189; *Linsey v. Ferguson*, 3 Lans., 196.) The

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referee erred in allowing the amendment to the complaint. (*Bradley v. Ardrich*, 40 N. Y., 504; *Mann v. Fairchild*, 2 Keyes, 111; *Heywood v. City of Buffalo*, 14 N. Y., 540; *Underdonk v. Mott*, 34 Barb., 113; *Bailey v. Southwick*, 6 Lans., 362.)

C. Frost, for the respondent. The referee had the power to allow the amendment to the complaint. (*Hubbell v. Meigs*, 50 N. Y., 480; *Bradley v. Bosley*, 1 Barb. Ch., 125; Code, § 173; *Bedford v. Terhune*, 30 N. Y., 453; *Ackloy v. Tarbox*, 31 id., 564; *Emery v. Pease*, 20 id., 62.)

DANIELS, J.:

The evidence and the referee's report show that the plaintiff was induced by fraudulent representations, made by the defendant, Robert Thomas, and assented to by the defendant, James Neill, to purchase a store of goods, together with the fixtures and leases, extending from the 15th day of February, 1869, the time of the purchase, to the 1st of May, 1871, for the price of \$4,000.

The purchase price was secured by a bond and mortgage, which the plaintiff procured to be executed and delivered, and his own two notes of \$500 each. It was part of the consideration of the sale, that the defendant, Thomas, should be a partner in the business with the plaintiff; and, in compliance with that understanding, they jointly carried it on, until near the first of the following month of June. By that time, the goods, of which the stock in the store consisted, were entirely sold out, the sale of the entire residue being made on the second day of that month. During the same time, the plaintiff sublet the upper portions of the premises included in the leases, and received from \$500 to \$600 rent for the same.

By the 22d day of May, 1869, the plaintiff had discovered the fraud by which he was induced to make the purchase, and offered to surrender and return the goods he then had, the fixtures in the store and the leases, to the defendants, who were the vendors, and demanded a return of his notes, and the bond and mortgage he had procured to be made and delivered. They refused to comply with the request made, and this action was then brought to rescind the purchase, and procure a return of the notes, bond and mortgage.

Before the 3d of June, 1869, the plaintiff gave notice to the defendants interested in the transaction, that he should not pay the rent becoming due on the lease on the first of that month. The landlord, for the non-payment of that rent, repossessed himself of the premises, by summary proceedings under the statute.

As the facts of the case existed when the action was commenced, the plaintiff had been so far benefited by the purchase, that, by his subtenants, and the occupancy of himself and his partner, he had enjoyed the property, demised by the leases assigned to him, from the fifteenth of February to the end of May, and received the proceeds derived from the sale of at least half the stock of goods transferred to him.

To that extent, he had put it out of his power to return what he had received by the purchase. And, on the second of June, he still further extended that incapacity, by disposing of the residue of the stock. This rendered him incapable of rescinding the contract of sale, and, by doing so, entitling himself to a return of the notes, bond and mortgage, given for the purchase price.

In order to maintain the right of a party, either at law or in equity, to rescind a sale or purchase of property, on account of fraud, it is necessary that the party designing to do so, shall be able to restore and return what he himself has received, as the equivalent of what he may have been induced to part with by means of the fraud. Where that cannot be done, the fraudulent transaction cannot be annulled by the party defrauded. It cannot be rescinded in part and affirmed in part, as it would be by the retention of any of its fruits. An enjoyment of the advantages of the transaction, precludes the party receiving them from repudiating that portion which may prove to be detrimental to his interests. This rule is very well settled, and it constituted a complete answer to the plaintiff's action as one in equity for the rescission of the sale.*

But, notwithstanding this inability, the learned referee held both the notes given by the plaintiff, and the bond and mortgage, to be invalid and without consideration, because they had been procured by the false and fraudulent representations made by the defendants, Thomas and Neill; and judgment was entered in

* Cobb v. Hatfield, 46 N. Y., 533; Springer v. Dwyer, 58 Barb., 189. Also the decision on this transaction by Court of Appeals, in Pullman v. Aiken.

accordance with this conclusion. This conclusion cannot be sustained. For, even though given for property which the plaintiff was induced to purchase by means of fraudulent representations, there was a sufficient consideration to sustain them, as long as the transaction was in such a condition as to render the plaintiff incapable of rescinding it. He could not retain its fruits and still resist a liability for the purchase price. The party defrauded, is not deprived, in such a case, of a proper remedy for the redress of the injury produced by the fraud perpetrated. For he may maintain an action for the recovery of such damages as, with what he may have recovered by the sale, will form an equivalent for what, by the terms of the purchase, he was entitled to have as its fruits. And beyond that, he may make use of his right for the recovery of damages, either by way of maintaining an independent action for their recovery, or by way of recoupment or counterclaim, in reduction of the seller's claim for the purchase price.

The law gives the purchaser his election. He may assert his right to damages for the fraud, by way of an action in his own behalf, or avail himself of it as a defense to a suit for the recovery of the purchase price of the property sold.*

During the progress of the trial, the plaintiff applied to the referee for leave to amend the complaint, by alleging that he had sustained damages, by reason of the false and fraudulent representations contained in his complaint, to the amount of \$5,000, and demanding a recovery of such damages, and that the same, because of the vendor's insolvency, should be declared a lien upon any amount found due from him on account of the sale.

The defendants objected to the allowance of the amendment, but the referee overruled the objection and permitted it to be made. This objection, though general in its terms, was sufficient to present the point of the referee's power to allow the amendment to be made; and no amplification of it could have been of any benefit to the referee or the plaintiff, because the ground on which it stood, could not be changed by any act of either.†

As the complaint contained nothing upon the subject of the

* *Beecker v. Vrooman*, 18 Johns., 802; *Van Epps v. Harrison*, 5 Hill, 63; Code § 180, sub. 1; *Boston Silk and Woolen Mills v. Eall*, 37 How., 29.

† *Merritt v. Seaman*, 2 Seld., 168.

plaintiff's right to damages, this amendment introduced an entirely new element into the case, constituting of itself an independent right of action, not within the issues referred to the referee to try.

It was not simply supplying a variance by an amendment, which the referee had the power to do. For as the plaintiff could not maintain the action in the shape he had placed it by his complaint, because of his inability to rescind the sale, his case was unproved in its entire scope and meaning. And that could not be corrected by any amendment the referee had the power to allow.*

The only mode by which that could be properly done, was by suspending the trial until relief could be obtained by special motion, on notice, before the court. The power, by that proceeding, is ample to meet such emergencies as the plaintiff's case was found to encounter. And it was the only mode in which he could be relieved, without a discontinuance of the action and the institution of a new suit. On such a motion, the parties have an ample opportunity for a complete presentation of all the facts affecting the propriety of the amendment, and proper terms can be prescribed, to guard against surprise and injustice. It is true, the referee might secure to the parties the observance of all these rights, but the legislature did not deem it proper to confer upon him the power to hear and dispose of such an application. The case allowed to be alleged by the amendment, was distinct and different from that which the complaint had previously presented, and that, the referee had no authority to permit; it in effect gave the plaintiff the benefit of a new cause of action, without which, he must of necessity have had judgment against him.

It may be unfortunate for the plaintiff, who seems to have been grossly deceived and defrauded by the misconduct of the persons he dealt with, that his suit was not brought in the form the law prescribed for the case he was able to prove. But courts of justice have no power, for that reason, to disregard legal requirements in that respect, and award relief which, under well-settled principles, can only be administered under different circumstances from those disclosed by the complaint.

* Code, § 171; *Ransom v. Wetmore*, 39 Barb., 104; *Whitcomb v. Hungerford*, 42 id., 177; *Ford v. Ford*, 53 id., 525; *Degraw v. Elmore*, 50 N. Y., 1; *Ross v. Mather*, 51 id., 108.

After allowing the amendment, the referee permitted the plaintiff to recover damages occasioned by the fraud, deducted the value of the stock purchased and sold by the plaintiff from the amount, and directed judgment for the balance of \$186.07 in his favor. The relief given was not even hinted at in the original complaint, and for that reason it was wholly unauthorized.

By the judgment which has been recovered, the entire consideration received for the property sold, has been annulled, the plaintiff has enjoyed the use and proceeds of the leasehold premises for over three months, and received the avails of the goods delivered to him, amounting to over \$1,600, and still has a judgment for a balance in his favor. Such incongruous results cannot ordinarily be secured in the same action. Certainly not under the circumstances shown in this case. As the plaintiff cannot rescind, his relief must be confined to redress by way of damages, which possibly may be deducted from the sum he may owe to the vendors of the property, if their insolvency shall be satisfactorily established.* And such redress must assume the validity of the bond, mortgage and notes, so far as they may exceed the damages which equitably should be deducted from them on account of the plaintiff's loss resulting from the fraud. How far he may be entitled to relief in that respect, it is not necessary now to consider. But as he is not a party to the bond and mortgage, he will probably be found unable to reduce the amount secured by them, by any damages he may be entitled to recover. His relief, as long as he cannot rescind, must consist in damages, and not in annulling the bond, mortgage and notes given for the price of the property purchased.

The judgment has awarded to him more than, in any view of the circumstances, he can be entitled to receive.

It should be reversed and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and DONOHUE, J., concurred.

Judgment reversed and new trial ordered, with costs to abide the event.

* *Smith v. Felton*, 43 N. Y., 419.

Ten Cases.

THE PEOPLE EX REL. GEORGE H. PURSER, APPELLANT, v.
ANDREW H. GREEN, COMPTROLLER, ETC., RESPONDENT.

Mandamus — street openings — remedy of employes of the commissioners.

Persons employed by the commissioners, appointed to lay out and open streets in the city of New York, to act as clerks, prepare maps, etc., have no right of action against the city; their only remedy is against the commissioners employing them.

APPEALS from orders of the Special Term, denying motions for writs of mandamus.

T. C. T. Buckley, A. J. Vanderpoel and Allison & Shaw, for the appellant.

Dexter A. Hawkins, for the respondent.

DAVIS, P. J.:

The relator moved, at Special Term, in ten cases (all having the same title), for peremptory writs of mandamus, commanding the respondent, as comptroller, etc., to pay to him divers sums, amounting in the aggregate to \$113,550.24, besides interest, for his services as clerk, in divers street openings in said city, and in laying out Riverside Park, and for alleged room rent, and for services in copying reports in said matters.

The affidavits on the part of the respondent, read in opposition to the motion, deny in substance that the respondent has in his hands, or under his control, money collected in said several matters, sufficient to pay said demands, respectively, or any part of them, and that he has any special fund for that purpose.

And they alleged also, in substance, that the relator has been paid, within the last five years, upon similar claims, in the matter of other street openings, the sum of \$132,058.50, which was more than an adequate compensation, and more than he was equitably entitled to receive for all the services he has rendered, and room rent furnished in said proceedings; and that the city is entitled to

set up the said excessive payment, as an offset or counter-claim, in an action for his present demands. The respondent also insists that the relator has an adequate remedy by action, if he is entitled to any remedy. The court, at Special Term, denied the several motions, on the ground, as stated in the orders, that the relator has a remedy by action.

If the relator have any claim against the city, which can be enforced either by action or mandamus, for the several demands specified in his affidavits, it must arise under, and depend upon the provisions of the statutes, relative to street openings and the laying out of said Riverside Park, to which such proceedings in street openings, so far as they affect the questions arising here, are applied.* Section 189, of chapter 87, of the Laws of 1813,† provides that the commissioners appointed under and by virtue of this act, for any of the purposes aforesaid, who shall enter upon the duties of their appointment, shall each be entitled to receive not more than four dollars, besides all reasonable expenses for maps, surveys and plans, clerk hire and other necessary expenses and disbursements, for each day they shall respectively be actually employed in the duties of their appointment, the same to be paid by the mayor, aldermen and commonalty of the city of New York, and included in the before-mentioned assessment upon the persons and parties, deemed to be benefited by the operation and improvement, which shall have occasioned the appointment of said commissioners. Section 12, of the act of April 20, 1839 ‡ made provision for the taxation of the costs, charges and disbursements, provided for in the above section of the act of 1813. The act entitled, "An act to prevent fraud in the opening and laying out of streets and avenues in the city of New York," passed April 24, 1862, § provides that the compensation to the commissioners, in any proceeding thereafter to be commenced for the opening or altering of any street in the city of New York, north of Fourteenth street, shall not exceed, in the aggregate, exclusive of necessary disbursements thereafter mentioned, the sum of thirty cents a foot for the lineal extent of the street or avenue, or the portion thereof to be opened or altered; |

* See chap. 697, Laws of 1867, p. 1752, § 6.

† Valentines' Laws, p. 1207. § Chapter 488, Session Laws of 1862, p. 966.

‡ Laws of 1839, chap. 269. | Section 1.

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and the fifth section of that act declares, "that no costs, charges or expenses, of any description, shall be allowed in such proceeding, or charged on any lands affected thereby, except the compensation of the commissioners, as above limited, and their necessary disbursements for clerical services in copying, comparing or correcting said maps or profiles, extracting boundary lines from title papers, preparing the said diagrams and abstracts, and keeping proper minutes of said proceeding; and also for surveys and maps thereof, when specially directed by said court; and also for room rent actually paid, but in no case to exceed one dollar per day; for advertising, printing or posting any notices required by law, and for any other necessary incidental expense, not exceeding \$100."

The sixth section of the same act, provides for the taxation of the bill of costs, charges and expenses, and for the notice to be given thereof.

The relator, in his several affidavits, states that he was appointed by the commissioners, their clerk, and employed by them to draft and copy their reports, "which rendered it necessary to employ a large number of clerks and others, and to hire certain rooms, used by said commissioners and clerks."

It was understood to be conceded on the argument, by the respective counsel, that the authority of the commissioners to appoint or employ the relator as clerk, is to be found altogether in the section of the act of 1813, above quoted, and if it were not so conceded, it is apparent that the whole of such power is derived from the language of that section and the subsequent modifications thereof, above referred to.

It will be seen, therefore, that section 189, of the act of 1813, is simply declaratory of what the commissioners are entitled to receive from the mayor, aldermen and commonalty of the city of New York. To them is allowed a per diem for each commissioner, not exceeding four dollars per day, and their "reasonable expenses for maps, surveys and plans, clerk-hire and other necessary expenses and disbursements." The act of 1862 modifies the compensation of the commissioners, so far as to declare, that it "shall not exceed in the aggregate, exclusive of the necessary disbursements herein-after mentioned, the sum of thirty cents per foot for the lineal extent of the street or avenue opened;" and it defines, in the sixth

section, with more precision, the "necessary disbursements" that may be allowed, by pointing out to what the clerical services shall be limited, and when surveys and maps thereof may be included; what sum per day, of room rent actually paid, may be allowed, and what advertising, printing and posting, and then closes the door on all other incidental expenses, beyond the limitation "not exceeding one hundred dollars." All these acts provide for nothing more or less than compensation to the commissioners for their own services and expenses and disbursements, all of which are to be ascertained and taxed, and paid to said commissioners, according to the provisions and restrictions of clearly expressed statutes.

Undoubtedly, the commissioners had power to employ the relator, or any one else, to perform clerical services. That power is necessarily implied in the words, "reasonable expenses" for "clerk-hire," as it is stated in section 189, of the act of 1813, and in the words, "necessary disbursements for clerical services," as it is expressed in the act of 1862; nor is there any doubt that such reasonable expenses and necessary disbursements, when properly and lawfully ascertained, are to be paid to the commissioners.

But it is quite another question whether power is conferred to appoint a clerk who thereby takes an official or other relation towards the city, entitling him, as an independent officer or agent, to perform duties or services for which the corporation is bound, *ex contractu*, or otherwise, to pay him or be subject to mandamus or action.

The phrase, "expenses of clerk-hire," has no greater force to create such relation, between the person who performs clerical service and the city, than the words horse-hire, in like connection, would have had to establish like relations between the city and the owner of a horse that might be temporarily hired. In short, the expenses of clerical services given by the law, fall, like all other necessary disbursements paid or incurred by the commissioners, into the sum to be paid to the commissioners themselves, under the general terms of "compensation and reasonable expenses," used in the statute.

No privity of contract springs up between the corporation and a person employed as clerk, or to perform any other labor, by the commissioners, for the expense of whose services they are to be allowed

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as disbursements under the statute ; nor does any other relation of privity, for such persons are bound to take notice of the law, and to see that the statute provides for payment of the expenses, incurred in their employment, to the commissioners as taxable disbursements, and that no other mode of compensation is created ; and they are bound, therefore, to know that their principal is the commissioners, in whose service they are, and through whom, alone, their compensation is to be paid. If this were not so, every laborer employed by the commissioners, of whatsoever grade, and every person who furnishes any article, coming within the term, "necessary disbursements," is at liberty to sue the corporation, or mandamus its officers. It is no answer to this view, to say that it imposes too great a responsibility upon the commissioners. They take their position, *cum onere*, under the statute, and, besides, there is no difficulty on their part, as they may always arrange that payment of such disbursements as may be deemed burdensome, shall be made to their employes, when payment thereof shall be made to them by the corporation, in accordance with the statute.

Such disbursements are to be taxed under the statute, as a part of the bill of costs, charges and expenses allowed to the commissioners, and to be paid to them by the mayor, aldermen and commonalty of the city ; and there is no provision for taxation of the items of disbursements in such bills, in favor of other officers or persons.

No higher right to prosecute the writ of mandamus, is given to the relator, by the fact that taxation has been made of his charges. If the taxation has been separate, in his favor, as an individual claim against the city, it is probably irregular or without effect ; if as part of the reasonable expenses of the opening of the streets, in favor of the commissioners, the claim is for them to enforce, if it can be enforced at all, by suitable legal proceedings in their own names.

The fact, that, under the proceedings in the last five years for the opening of streets, the position of clerk to the commissioners, has assumed the magnitude of a department calling for compensation equal to \$50,000 a year, has no just legal effect upon the question involved in these cases. It is enough that the relator and the claim

he attempts to assert, occupy no position entitling him to demand the writ of mandamus against any officer of the city.

The court below did not consider this question, as it appears not to have been presented; but if the relator has, by any possibility, a personal right of recovery against the city, it must exist in some implied assumpsit, springing out of his employment by the commissioners, for certainly there is no provision of statute for any payment to be made to him. And in this view, his remedy could be pursued by action against the corporation. Justice FANCHER, whose opinion in the court below, dissenting from the conclusion of BARETT, J., has been furnished us, recognizes the absence of privity between the relator and the corporation. He says, as his first reason why a mandamus should be issued: "There is no privity of contract between the relators and the corporation; the work performed by them was performed for the commissioners, and is for the benefit of the general public, and not alone for the corporation. Nor are they employes of the corporation."

Assenting, substantially, to the premises of the learned judge, we are unable to yield to the conclusion, that, for this reason, a mandamus will lie. No creditor has a right of action for his debt, against a debtor of his debtor, but that fact goes no distance toward establishing that such creditor may have the writ of mandamus to reach moneys owing his debtor.

They are strangers in law, and no form of proceeding is, in this State, availing to make the one directly responsible to the other. The order appealed from should be affirmed.

Order affirmed, with costs.

the answer avers that, in all the transactions alleged in the complaint, he represented himself to be one of the firm of William O'Toole & Co., and acting for such firm in those transactions. It also alleges that the defendant then believed those representations to be true, and continued to believe them, and that the firm was composed of the plaintiff and some other person or persons unknown to the defendant who ought to be joined with him as plaintiffs in the action.

This answer not only failed to set forth the defense arising out of the violation of the statute, but beyond that, it distinctly alleged in substance that no such defense existed, for it averred that the term, & Co., used by the plaintiff in his business, did represent some person or persons who were interested with the plaintiff as partners, in the transactions referred to by the complaint.

If the plaintiff transacted business, under a name and style indicating the existence of a firm, when, in fact, he carried it on individually, and in that manner, sold and delivered the goods for the price and value of which he claimed to recover in this action, that was new matter constituting an affirmative defense, which, by the provisions of the Code, should have been set forth in the answer, in order to render it available upon the trial. For, in effect, every such defense admits the sale and delivery to have taken place, substantially as alleged by the plaintiff, but avers, that, in the transactions, the plaintiff acted under a prohibited style and name.* The consideration, in cases of this description, is an unlawful one, and hence, the promise is not obligatory. When that fact exists, it must be pleaded in order to render it available by way of defense.†

But in the present instance, although it appeared by the proof given upon the trial, it was neither disclosed by the complaint nor the answer. The former stated the goods to have been sold and delivered by the plaintiff individually; while the latter denied that, and averred it to have been by him, as a member of a copartnership firm. In this state of the pleadings, proof of the fact that the plaintiff, in the sale, was guilty of violating the provisions of the statute referred to, did not justify a dismissal of the complaint.

* Code, § 149.

† *McKyring v. Bull*, 16 N. Y., 297, 300.

That a defense, not made by the answer, appears in the proof, is not sufficient to defeat a recovery by the plaintiff, when it arises out of new matter constituting it. To have that effect, it must be alleged as well as proven.* In the last case, the fact constituting the defense, by way of new matter, was proved during the trial by the plaintiff, and yet it was not allowed to defeat a recovery, because the defendant had not alleged it in his answer.

Under the system of practice prevailing before the Code, the defense considered in the last case, as well as in the present one, may have been admissible under the general issue, without having the same effect follow a general denial, as that has been provided for, by the Code. For anything was admissible, under the general issue in assumpsit, which would show that the plaintiff never had a cause of action, while under the system devised by the Code, all new matter, constituting a defense, is required to be pleaded by the defendant.†

The disposition which was made of this case at the circuit, was erroneous, because the defense which was allowed to prevail, was not alleged in the answer of the defendant. For that reason, the order directing the complaint to be dismissed, should be set aside and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and DANIELS, J., concurred

New trial granted, costs to abide event.

* Button v. McCauley, 38 Barb., 418; Wright v. Delafiel, 25 N. Y., 266; Brazill v. Isham, 2 Kernan, 9.

† 16 N. Y., 309.

THE PEOPLE *EX REL.* WILLIAM WADE, AND SAID WILLIAM WADE, *v.* JOSEPH P. STRACK.

Term of office—power of authority making appointment to prescribe—statutes—when retrospective.

By section 9, of article 2, of chapter 187, of the Laws of 1870, the board of assistant aldermen of the city of New York, was authorized to "choose a president from its own members." *Held*, that as the duration of the office was not declared by the law, the board had power to prescribe the term for which it should be held.

In January, 1873, the relator was elected president of the board, by a resolution declaring him to be so elected for the year 1873. Section 6, of article 11, of chapter 335, of the Laws of 1873, after declaring that the board of aldermen and assistant aldermen, shall each elect a president from its own members, in a manner therein prescribed, provides, "and when once chosen, he can be removed, before the expiration of his term as alderman or assistant alderman, only by a vote taken on a call of the ayes and noes of four-fifths of all the members of the board." *Held*, that the relator was not thereby legislated into a term of office, beyond that for which the board had chosen him, and that, upon the expiration of such term, the board was authorized to elect a president as his successor.

CASE submitted upon an agreed state of facts, under section 372 of the Code.

The facts are stated in the opinion.

Henry E. Davies, for the relator. The board of assistant aldermen had no power to fix the duration of the office of their president. (Dillon on Mun. Corp., § 146, p. 269; *Scudder v. City of Detroit*, 13 Mich., 346; *Vasen v. City of Augusta*, 38 Georgia, 542.) Where no provision is made for the government of municipal bodies by law, they are governed by the ordinary rules of legislative bodies. (*Barker v. City of Pittsburgh*, 4 Barr., 49; *Commonwealth v. Bacon*, 6 S. & R., 322; *Wetmore v. Story*, 22 Barb., 414.)

Charles W. Brooke, for the respondent.

DAVIS, P. J.:

It appears, by the agreed statement of facts in this case, that the members of the board of assistant aldermen of the city of New

York, were elected, in the fall of 1872, for the term of two years, commencing on the first day of January following; that on the first Monday of January, 1873, the board organized by the election of the officers authorized and required by law; that at such election, the relator, William Wade, was elected president of said board by resolution, declaring him to be so elected for the year 1873; that the board thereupon proceeded to and continued to transact its business, under such organization, until and after the passage of the act, entitled "An act to reorganize the local government of the city of New York," passed April 30th, 1873.

Section 2, of article 2, of the above named act, declares that the legislative power of the corporation, shall continue to be vested in a board of aldermen and a board of assistant aldermen, who, together, shall form the common council of said city, and that from and after the 1st day of January, 1875, the board of assistant aldermen shall be abolished, and thereafter the board of aldermen shall constitute the common council.

The sixth section of the act declares that each board shall choose a president from its own members, by a call of the names of the members of the board, upon which call, each member shall announce his choice, and, when once chosen, the president can only be removed, before the expiration of his term as alderman or assistant alderman, by a vote, taken by a call of ayes and noes, of four-fifths of all the members of the board, of which he shall have been chosen president; and the last clause of the section provides, that it "shall not be construed to require or authorize a reorganization of the existing board of aldermen or board of assistant aldermen."

On the 5th of January, 1874, the board of assistant aldermen adopted a resolution, that, "at the hour of twelve of that day, the board proceed to reorganize, and that the same be made a special order for that hour;" and at the time specified, the board proceeded to elect the respondent to the office of president of the board.

The relator was not removed by a vote, taken by ayes and noes, of four-fifths of the members of the board, but the election was had upon the claim that the relator's term of office had expired. The case states that the respondent, upon this election, claims the office of president of the board, and the right to exercise its

powers and duties and emoluments. The relator claims that he is still the lawful president of the board. The relator was elected president under the provisions of the charter of 1870.* The ninth section of that charter provides that "each board shall choose a president from its own members." It contains no provision touching the term of office of the president; nor as to the mode of choosing, nor as to the manner of removal.

At the time of its passage, the term of office of assistant aldermen was limited to one year, but, by a subsequent amendment, the term was extended to two years, and the relator and the members of the board of which he was chosen president, were elected subsequently to the amendment. The act of 1873 introduces several new features. First, by designating how the choice of president shall be made, to wit, "by a call of the names of the members of the board, upon which call each member shall announce his choice." Second, by making the term of office of the president, when chosen, concurrent with his term as alderman or assistant alderman. Third, by declaring how, only, he may be removed, to wit, by a vote taken by a call of the ayes and noes, of four-fifths of all the members of the board.

The section containing these provisions, superseded section 9, of the charter of 1870, and is clearly applicable to the boards existing at the time of its passage, except wherein restricted by its own, or some subsequent provision of law. The imperative language of section 6, of the charter of 1873, might perhaps have been construed to require a complete reorganization of the respective boards, by a new election of officers; and to guard against such an effect, the legislature declared that this section "shall not be construed to require or authorize a reorganization of the existing board of aldermen or assistant aldermen." The effect of the charter of 1873, was to leave the existing organizations of the boards precisely where it found them. It neither required nor gave authority for reorganization, nor did it diminish or enlarge any existing terms of office. Doubtless it subjected all future elections of president of the boards to its prescribed manner of choosing, its mode of removal, and its term of the office, as indicated in the

* Laws of 1870, chap. 187, p. 366.

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section ; withholding authority for reorganization, in the manner in which that is done in the act, was equivalent to declaring such reorganization to be unlawful, and, therefore, if the board, after the passage of the act of 1873, had proceeded to reorganize by the election of a new president, during the existing term of the relator, its proceedings, however formal, would have been in violation of law, and therefore void. But there can be no doubt that the provisions of the charter of 1873, relative to the election of a president of the board, are quite as applicable to any exigency that may arise requiring a new election, as to the original organization of a new board. That is to say, if a vacancy in the office of president of the board occur, by death or resignation, or removal of the incumbent from the city, or any other event, the board is clothed with ample power "to choose a president from its own members," under section 6 of the new charter. The act of making such choice would not be "*reorganizing*," within the sense in which that word is used in the act. The intent of the restriction, was to prevent the substitution of a new organization for the existing one, while the latter was in full force and operation, and not to prevent that kind of reorganization which springs from the happening of vacancies, or the ending of fixed terms of office.

It is claimed by the respondent, that his election was not made to supplant an existing officer, by removing him from a continuing term, but to fill a vacancy which had occurred from the expiration of an official term. The disposition of this case depends altogether upon the correctness of this position, and that, in turn, depends upon the question whether the resolution of the board, passed at the election of the relator, declaring him to be elected president *for the year 1873*, was a lawful designation or limitation of his term of office. There seems to be no room for doubt, that the intention of the board was to make the relator president for one year, leaving the succession for the second year open to a further choice. Had the board the power to do this, or was it bound to elect once for all, and for the full period of the term of assistant alderman? If we refer to the charter of 1870, under which the board acted in electing the relator for the year 1873, we find the power of choosing the president given in the most general terms: "Each board shall, 1st, choose a president from its members."



Here is no prescribed manner of choice, and no declared term of office. The choice may be by resolution, by *viva voce* vote, or by ballot, and there seems to be no reason to doubt that the board, under such general grant of power, may determine for itself the form of its exercise. May it not by the resolution, the passage of which elects the officer, prescribe the term for which he is chosen? Where the Constitution or a statute fixes the term of an officer, there is no power in the appointing or electing body to prescribe any other term. The power must be exercised in conformity to the law, and the attempt to impose a limitation, short of the term fixed by statute, is as nugatory as would be an attempt to enlarge the term. But in this case there was no existing statute declaring a term. The sole and whole power to choose, was handed over by statute to the board, without limitation as to term, or restriction as to mode. In this state of facts, we are not at liberty to seek for analogies in the rules and practices of parliamentary or other legislative bodies, if we have general statutes applicable to the case. It will probably be found that the usage of such bodies is to choose a presiding officer for the full official term of the body itself; but such a rule, if otherwise obligatory, cannot prevail in cases where the legislature has established another and a different one. Section 8, of the general provisions of the Revised Statutes, "respecting the appointment of officers, their qualifications, the commencement and duration of their offices," is in these words: "Every office of which the duration is not prescribed by the Constitution, or is not or shall not be declared by law, shall be held during the pleasure of the authority making the appointment."*

The president of the board of assistant aldermen is a civil officer, chosen under authority conferred by law, and amenable, as such, to the laws of the State. At the time of the election of the relator, the office was one, of which the duration was neither prescribed by the Constitution, nor *declared* by law. The statute, therefore, provided that it should "be held during the pleasure of the authority making the appointment."

That pleasure was declared, by the resolution electing the relator, to be, that he was chosen for the year 1873. A question

*1 R. S., 117, § 8.

might have arisen whether, if there had been an attempt to remove the relator during the year 1873, the resolution could operate so to fix a term as to prevent a removal at pleasure, but that question does not arise where the period expressed has elapsed, and the appointing authority is proceeding to fill the office after the lapse of the time named.

Unless there is something to be found in the charter of 1873, which operates to extend the duration of the relator's office, as president of the board, beyond the time prescribed in the resolution electing him, a vacancy in the office occurred on the expiration of the year 1873, which the board was at liberty to fill by an election conducted in conformity to the provisions of the new charter. It is the opinion of the learned counsel to the corporation, that this is found in the words, "and when once chosen he can be removed before the expiration of his term as alderman or assistant alderman only by a vote taken on a call of the ayes and noes of four-fifths of all the members of the board." This language is not retroactive. It was not designed to legislate the relator into office beyond his existing term. Its primary subject was the regulation of amotion from office, and it only follows as an incident to that subject, that it fixes the duration of future terms. It is, therefore, to carry it out of its intended channel, to hold that its effect is to enlarge the duration of an office, beyond the limitation lawfully fixed before the passage of the statute. Even if it might properly be held to prescribe the mode in which the relator could only be *removed* from the office, yet it would not follow that it would also prevent the expiration of his term by its own limitation, which event would render a removal both unnecessary and impossible. Statutes are not applied retrospectively by mere construction. The rule is, that they cannot have such a construction, unless so declared by express words or positive enactment, or unless a clear intent of the legislature to give them such retroactive effect, is shown by the language used.* Our conclusion is that the relator was not legislated into a term of office, beyond that for which the board had chosen him;

* *Jarvis v. Jarvis*, 3 Edw., 463; *Butler v. Palmer*, 1 Hill, 324; *Wadsworth v. Thomas*, 7 Barb., 445; *Johnson v. Burrill*, 3 Hill, 288; *Berley v. Rampacher*, 5 Duer, 183; *Ely v. Holton*, 15 N. Y., 595; *Wood v. Oakley*, 11 Paige, 400; *McCluskey v. Cromwell*, 11 N. Y., 593.

that on the expiration of that term, his office was vacant by lapse of time, and that, until his successor was chosen, he was discharging its duty by force of the general statute, which provides for such discharge "until his successor should be duly qualified;" * and that the board, after such expiration of the term, was, in choosing his successor, acting upon an exigency which required no removal, and was exercising its original and lawful authority. Judgment must therefore be given for the respondent.

DANIELS and DONOHUE, JJ., concurred.

Judgment for defendant, with costs.

THE PEOPLE *EX REL.* GOTTLIEB GRISSLER AND ANOTHER
v. NICHOLAS W. STUYVESANT, A LUNATIC, BY HENRY
DUDLEY, HIS COMMITTEE, AND NICHOLAS W. S. CATLIN,
EXECUTOR, ETC., OF JOSEPH R. STUYVESANT, DECEASED.

Summary proceedings—covenants in lease—rent.

Certain premises were leased by S. to B. & M., who subsequently executed to S. a mortgage on the leased and other property; the rent being unpaid, S. entered into possession of the premises under a warrant of dispossession; subsequently he foreclosed the mortgage, and at the sale the premises were purchased by the relators; the deed conveying the premises, on which were the unexpired leases of B. & M., "to have and to hold the same for the unexpired term of the said leases"; *held*, that they thereby became, in effect, the assignees of the lease of B. & M., unaffected by the previous entry of S.; that the covenant to pay rent was not extinguished; and that the relation of landlord and tenant existed between S. and the relators. S., upon his death, devised certain of the premises, in which he had a fee subject to these leases, to his son; and the others, in which he had only a leasehold interest subject to the leases, passed to his executor; *held*, that the rent was not thereby apportioned, but remained an entirety so far as the tenants were concerned.

In summary proceedings, it is proper to demand interest upon the rent.

CERTIORARI to review the decision of Justice J. W. FOWLER, in summary proceedings had before him, to recover the possession of land for non-payment of rent.

Joseph R. Stuyvesant was, in 1867, the owner of two lots on

*1 R. S., p. 117, § 9.

Third avenue, New York, known as lots Nos. 158 and 160, and the lessee of two other lots on the said avenue known as lots Nos. 152 and 154, and on the thirtieth of July of that year he leased the four lots to Browning and Moore for ten years from May 1st, 1868, at the yearly rent of \$6,000, payable quarterly. On the 4th of August, 1868, the lessees made a mortgage for \$20,000, on this lease and a lease of other property held by them, to Stuyvesant.

On the 2d of April, 1869, the rent being unpaid, Stuyvesant entered into possession of the premises under a warrant of dispossession. On the third of April, an action was commenced to foreclose the mortgage for non-payment of interest, and, under a decree in that action, the sheriff, on the 11th of October, 1869, sold and conveyed to the relators the unexpired term of Browning and Moore, in the premises. They refused to pay rent to Stuyvesant, and on the 6th of March, 1872, proceedings to dispossess them were commenced by him, and a judgment rendered against them. A certiorari was brought by them to this court, and at a General Term, held January, 1873, the judgment was affirmed, and at the General Term, held December, 1873, the court refused leave to the relators to appeal to the Court of Appeals on the merits.

J. R. Stuyvesant died in March, 1873, leaving a last will and testament, by which he devised all his real estate to his son, Nicholas W. Stuyvesant, and appointed Nicholas W. S. Catlin one of his executors, who alone qualified as such.

Nicholas W. Stuyvesant became insane before the death of the testator, and on the 24th of April, 1873, the care and custody of his person and the management of his estate, were committed to the respondent, Henry Dudley. The executor authorized Dudley to demand such portion of the rent, accruing under the terms of the lease, as might be due him, either separately or in conjunction with Dudley, who, thereupon, demanded the whole of the rent due for the quarters ending May 1, August 1 and November 1, 1873, with interest from the respective quarter days, and, upon the refusal of the relators to pay, proceedings for dispossession were commenced. Judgment was given in favor of the respondents.

John J. Townsend, for the relators.

George V. N. Baldwin, for the respondents.

LAWRENCE, J. :

In the case of these relators against Joseph R. Stuyvesant, which involved the same lease now under consideration, it was held by this court, Justice LEARNED delivering the opinion, that when Joseph R. Stuyvesant secured in his judgment of foreclosure, the payment of the rents, for the non-payment of which he had entered, and when he sold, *as being still in force, the lease granted by him to Browning and Moore*, he (Stuyvesant) waived any forfeiture which had taken place under the lease; also, that the relators, purchasing under such circumstances, became in effect the assignees of the lease, unaffected by the previous entry of Stuyvesant. *

*The case of *The People ex rel. Gottlieb Grissler and another v. James W. Fowler, Justice*, referred to above, was decided at the January term, 1873.

John J. Townsend, for the relators.

Douglas Campbell and Henry Hilton, for the respondents.

LEARNED, J. :

The important question in this case is as to the position which the relators hold to the defendant.

In 1867, Stuyvesant leased for ten years, to Browning and Moore, certain premises in New York, for the rent of \$6,000 per annum. In 1868, Browning and Moore executed to Stuyvesant, a mortgage on this leased property and other property, for \$20,000 and interest to April, 1869. Stuyvesant went into possession under a dispossession warrant. The effect of this, under some circumstances, would be to terminate the lease, but the statute provides (Laws 1842, chap. 240, § 1) that, if the unexpired term exceeds five years, the lessee may redeem within one year.

There remained, therefore, in Browning and Moore, a right to redeem their lease by paying the rent in arrear and costs and charges. Thereupon the mortgagee, Stuyvesant, proceeded to foreclose the mortgage. This course seems to have been proper, in order to collect the amount due on the mortgage, and there was something to be foreclosed, because the mortgagors, being the lessees, held this statutory right of redemption. This foreclosure was, in some respects, unwisely conducted. The description of the property in the complaint and other proceedings, might lead one to think that the mortgage had conveyed a fee; but the relators were parties to the foreclosure, and set up in their answer, the fact of the lease by Stuyvesant to Browning and Moore. They knew, therefore, what the interests were which Browning and Moore had mortgaged, and which Stuyvesant was foreclosing. The foreclosure proceeded to a judgment and sale, and on that sale the relators, Grissler & Fausel, purchased and accepted the deed executed under the judgment October 11, 1869; under that deed they went into possession. That deed, in form, conveys the premises, with the leases, unexpired, of Browning and Moore, "to have and to hold for the unexpired term of said leases." It is plain.

We see no reason to doubt that this view of the relation between Stuyvesant and the relators, is correct, and therefore concur in the opinion delivered in that case.

The relators then being in possession of the demised premises, as assignees of the lease, the position that they are not liable by force of the covenant to pay rent contained in the lease, and that the conventional relation of landlord and tenant did not exist between

therefore, that this deed conveyed to the purchasers the leases, unexpired, executed by Stuyvesant to Browning and Moore; or, since we have seen that there probably remained of the lease, prior to the foreclosure, only the statutory right of redemption, this deed conveyed that right. The judgment, however, under which the deed was executed, provided that out of the avails of the sale there should be first deducted, the rents due by Browning and Moore on the lease, before the payment to the plaintiff of the amount due on his mortgage. By this, Stuyvesant, in effect, provided that the statutory right of redemption should be exercised, so that any purchaser at the foreclosure sale should obtain the benefit of the lease executed by Stuyvesant to Browning and Moore, free from any previous forfeiture. The amount paid on the sale under foreclosure, was \$30,000, and as the lease, at the time of the aforesaid re-entry, had run only two years, the money received on the sale, must have been enough to pay the rent then in arrear, as Stuyvesant was both mortgagee and also landlord. This foreclosure sale, describing the lease as existing with the provision in the judgment for redemption from any previous forfeiture, must be held to have conveyed to Grissler & Fausel, the lease for the unexpired term. By accepting the deed, they became practically the assignees of Browning and Moore, and tenants of Stuyvesant under his lease. This was the view taken in another litigation between these same parties. (*Stuyvesant v. Grissler*, 12 Abb. [N. S.], 6.) No question would probably have arisen on this point, if it had not been stated that Stuyvesant, previous to the foreclosure, had taken possession under a dispossession warrant. But when he subsequently received, in his judgment of foreclosure, the payment of the rent, for non-payment of which he had entered, and when he sold, as being still in force, the lease executed by him to Browning and Moore, he waived any forfeiture which had taken place, and the relators, purchasing under these circumstances, became, in effect, the assignees of the lease, unaffected by the previous entry. This, then, disposes of the principal question in the case. It is objected that the provisions in chapter 741, Laws of 1870, by which proceedings for dispossession may be had before any justice of the district, is "local," and therefore unconstitutional, under section 16, article 3. The decision in *Huber v. People* (49 N. Y., 132), on which this objection mainly rests, held that the tax levy bill was a local act. It cannot, however, be claimed that chapter 741 of the Laws of 1870, being an act amendatory of the Code of Procedure, is itself a local act. The objection is that the particular provision in that act is local. But taking the definition of that word from *People v. Supervisors of Chautauqua* (43 N. Y., 21), a "local" act is one "which in its subjects

them and Joseph R. Stuyvesant, is not tenable.* Nor can it be maintained that Joseph R. Stuyvesant, by the terms of his will, apportioned the rent, in the sense claimed by the relators' counsel, between his son and his executor, by devising to the former the lots Nos. 158 and 160 Third avenue, and bequeathing to the latter the leasehold interest in the lots Nos. 152 and 154 Third avenue.

The rent remained an entirety and unapportioned, so far as the tenants were concerned. The fact that it was to be divided or distributed, after payment, between the heir-at-law and executor of

relates but to a portion of the people of the State or to their property." Now, this provision is not limited to any portion of the people. Any one who has occasion to do so, may avail himself of the jurisdiction conferred. The Code, and the several amendments thereto, in many places contain clauses relative to tribunals, whose jurisdiction does not extend throughout the State. Title V is one instance. These clauses are not, for that reason, unconstitutional. A further objection is taken, that the affidavit, on which the proceedings were commenced, is insufficient. But it alleges the making of the lease, the length of the term, the rent, the assignment of the lease to the relators, their occupation, the non-payment of rent, the demand and notice. These allegations seem to be all that is necessary. Another question is as to the regularity of the jury. The justice, under the statute, nominated twelve. It appeared that they had not been properly summoned. He then nominated twelve others. Only eight attended; six of those were drawn to compose the jury. It appears by *Roach v. Cosine* (9 Wend., 231) that it was proper to issue a new venire, and there is nothing in the statute which affirmatively requires that the names of all who were summoned, shall be placed in the box. It would be useless to place names in the box, of persons who had, from any cause, failed to attend.

The notice requiring the payment of the rent, was not irregular for stating the amount of interest owing upon the rent. The payment required was expressly of the "rent," and the case of *Griffin v. Olark* (33 Barb., 46) is conclusive upon this point. The relators in this case, being, as we hold, the tenants of Stuyvesant, and owing him, as rent for the premises, the amount claimed, have suffered no injury. They have not been removed from the premises, but have prevented such removal by the payment of the rent which they owed. If there had been any irregularity, therefore, in the proceedings, the only injury occasioned to the relators by these proceedings would be the costs, which they have paid; as to the rent, that they ought to have paid without compulsory proceedings. The proceedings before the justice should be affirmed, with costs.

BRADY, J., concurred.

Proceedings and judgment affirmed.

* *People v. Stuyvesant*, opinion of LEARNED, J.; see also *Stuyvesant v. Grissler*, 18 Abbott, N. S.

Stuyvesant, was a matter which in no way affected or interfered with the rights of the relators. The *whole* of the rent was due from the tenants, and the *whole* of the rent was due to the respondents, as joint owners thereof. The tenants have no interest in the apportionment to be made between the owners of the lots in which Stuyvesant held a leasehold interest, and those which he owned in fee. Their duty was to pay the rent when it fell due, and not to concern themselves with its distribution after payment. We see no impropriety in Mr. Dudley's making a demand of the rent for the whole of the demised premises. He was authorized by the executor, Mr. Catlin, to act for him, and to take all necessary measures to collect the rent. He was authorized, as the committee of Nicholas W. Stuyvesant, to act for Stuyvesant.

The statute relating to "Summary Proceedings," does not require that the demand should be made by the actual owner of the rent. It may be made by an agent duly authorized, as Dudley was in this case. Again, all that the statute requires, to give the justice before whom the proceedings are brought, jurisdiction, is that the landlord or lessor, or his legal representatives, agents or assignees, should make oath, in writing, of the facts which, under the provisions of the statute, authorize the removal of the tenant. In this case, Dudley was the legal representative of the deceased landlord, as respected the two lots owned in fee, by the terms of the will devising those lots to N. W. Stuyvesant, for whom Dudley was the committee; and, as respected the two lots in which the landlord held a leasehold interest, he stood as the agent of the legal representative, Catlin, by virtue of the authority delegated to, or conferred upon him by Catlin. We are also of the opinion that the demand for interest on the rent was proper.*

On the whole case, we are satisfied that there was no error in the proceedings before the justice, and the decision below is, therefore, affirmed, with costs.

DAVIS, P. J., and DANIELS, J., concurred.

Decision affirmed.†

* *Griffin v. Clark*, 33 Barb., 46.

† At the May General Term, an application made by the relators for leave to appeal to the Court of Appeals, was granted.

MEMORANDA

OF

CASES NOT REPORTED IN FULL.

JOHN J. KIERNAN, RESPONDENT, *v.* FRANCIS A. ABBOTT,
IMPLEADED WITH MANHATTAN QUOTATION TELEGRAPH COMPANY,
APPELLANT.

Examination before trial—contempt—evidence.

In this action, brought by the plaintiff to obtain an injunction against the defendants, the issue between the parties, was, in substance, whether the appellant, Abbott, surreptitiously obtained the foreign news dispatches of plaintiff, and furnished them to his co-defendant, a rival of plaintiff in business. Plaintiff procured an order for the examination of Abbott before trial. Abbott, having testified that the news he furnished to his co-defendant, was obtained by him several times each day, directly by cable from London, and that the dispatches came to a banking house in New York, was asked: "What banking house was that?" He refused to answer. *Held*, that the question was a proper one; that the plaintiff was entitled to know through what banking house the dispatches were received, in order that he might have an opportunity to call the members and clerks of the house and examine them; and that the order, adjudging the defendant guilty of a contempt, and imposing a fine and imprisonment for refusing to answer it, was proper.

APPEAL from an order at Special Term, in proceedings to examine the defendant, Abbott, before trial, adjudging him guilty of contempt, and imposing a fine and imprisonment for refusing to answer, on his examination before the referee, a question proposed by plaintiff's counsel.

E. P. Conoles, for the appellant.

———, for the respondent.

Opinion per *Curiam*.

Present, DAVIS, P. J., and DANIELS and LAWRENCE, JJ.

Order affirmed, with costs.

CHARLES E. HILL AND ANOTHER v. JOHN D. McKENZIE
AND ANOTHER.*Conditional sale — delivery.*

Plaintiffs sold to Webb & Co., May 21st, 1867, a quantity of teas, for cash on delivery. The teas, when sent for on the twenty-fourth, were found to be in a condition requiring cooperage; and, the cartman refusing to receive them, it was arranged that he should take them to Webb & Co.'s store, and that the plaintiffs should send their cooper to do the necessary work. The bill was sent to Webb & Co. the same day, but they refused to pay it until the cooperage should be done. The next morning the cooper went to the store, but was not allowed to do the work at that time; on the same day, the plaintiffs, supposing the coopering to have been done, again sent the bill, and payment was again refused, for the same reason; about noon of that day, the defendants purchased the teas of Webb & Co., who had become insolvent. *Held*, that the sale was conditional; that a delivery upon such sale, vests no title in the purchaser until the cash be paid, unless the condition be waived; and that in this case there was no waiver, or intention to waive the condition of payment.

THIS was an action of replevin, tried before Mr. Justice VAN BRUNT and a jury. The judge directed a verdict for the plaintiffs for the full amount claimed, and ordered the exceptions to be heard, in the first instance, at the General Term.

Charles D. Adams, for the plaintiffs.

Alvin C. Bradley, for the defendants.

Opinion by DAVIS, P. J.

DANIELS and DONOHUE, JJ., concurred.

Judgment ordered for the plaintiffs on the verdict.

THE TENTH NATIONAL BANK OF THE CITY OF NEW
YORK v. ROBERT L. DARRAGH AND ALBERT MARSH.

*Surety—admissions of principal, when admissible against—complaint dismissed—
when.*

Action upon a bond given by Marsh, as principal, and Darragh, as surety, to secure to plaintiff the faithful performance of the duties of Marsh, as an officer of the bank. Marsh was guilty of a defalcation to an amount in excess of the penalty of the bond. The summons and complaint were served on both defendants, but Darragh alone appeared and answered. The court directed a verdict for the plaintiff for the penalty of the bond, with interest. The court admitted, against defendants' objection and exception, the admissions of Marsh, showing his defalcation, made long after the transaction, and after he had ceased to be an officer of the bank; *held*, that this was error.*

The evidence not having been submitted to the jury, the judgment would be affirmed if there was sufficient legal evidence in the case to establish the liability of Darragh and justify the direction given by the court, independently of the unlawful evidence, as the court would be presumed to have acted on the legal evidence only; but as sufficient evidence did not appear in this case, to authorize the court to direct a verdict, the judgment was reversed.

APPEAL from a judgment, in favor of the plaintiff, entered upon a verdict.

Joseph M. Dixon, for the appellant.

E. L. Fancher, for the respondents.

Opinion by DAVIS, P. J.

DANIELS and DONOHUE, JJ., concurred.

Judgment reversed and new trial ordered, costs to abide event.

*Greenleaf on Evidence, § 187; 1 Phillips Ev., 194, 195, 201, 525, and cases there cited; Smith v. Whittingham, 6 Car. & P., 78; Moore v. Meacham, 10 N. Y., 267.

EUGENE KELLY AND ANOTHER, RESPONDENTS, v. EMANUEL
BERNHEIMER AND ANOTHER, APPELLANTS.

Fraud—power of court to compel defendant to elect between inconsistent defenses.

This action was brought to recover the price of barley, sold and delivered by the plaintiffs to the defendants. The defendants set up a warranty and a breach thereof, and that they were induced to purchase the barley by means of fraudulent representations, made by a person having charge of its sale for the plaintiffs, by which they had sustained damages, and for which they claimed an allowance. After the defendants rested, the court, upon the application of the plaintiffs' counsel, compelled them to elect upon which of their two defenses they would proceed. *Held*, that this was error. The court has no power to require defendants to elect upon which of their defenses they will rely, where more than one is set forth in the answer, and evidence is given to prove their truth, unless they are so far inconsistent that they cannot properly coexist in the same transaction.

Defendants, in support of their allegations as to fraud, offered to prove statements of Tilden, who acted as plaintiffs' agent in selling the barley, made just before the sale, while the barley was being changed from the vessel in which it was loaded to the lighter, as to its quality, and that these statements were afterward communicated to the defendants, and acted upon by them; the court excluded the evidence. *Held*, that this was error.

APPEAL from a judgment in favor of the plaintiffs, entered upon the verdict of a jury, and from an order denying a motion for a new trial made on the judge's minutes.

D. M. Porter, for the appellants.

Aug. F. Smith, for the respondents.

Opinion by DANIELS, J.

DAVIS, P. J., and DONOHUE, J., concurred.

Judgment reversed and new trial ordered, costs to abide the event.

JOHN GRIERSON, APPELLANT, v. THOMAS F. MASON
RESPONDENT.

Written instrument—its object may be shown by parol evidence.

This action was brought to recover moneys received by the defendant, as agent, from the sale of goods delivered to him to be sold on commission by the firm of J. S. Croper & Co. and the plaintiff, the successor in business of said firm. The defendant alleged, by way of counter-claim, his employment by the firm, for the sale of their goods, as agent, for one year, at a yearly compensation of not less than \$1,500, and a failure by them, and the plaintiff as their successor, to perform the contract. The referee reported in favor of the defendant for an amount sufficient, in addition to the proceeds of sales in his hands, to pay the salary of \$1,500.

After he entered the employment of the firm, he drew up an instrument, which was, at his request, signed by the firm and delivered to him, by which it was agreed that he should have the sole and exclusive right to sell all the goods manufactured by the firm, at prices and terms to be determined by the firm, for a commission of five per cent, and to make return of all sales on the first of each month. The referee received evidence, against plaintiff's objection, to show that the instrument was not intended to operate as a contract between the firm and the defendant, but was given to enable the defendant to procure advances upon the goods manufactured by the firm; *held*, that the evidence was properly admitted. That the design and object of an instrument in writing, even when apparently perfect as an obligation in and of itself, may be shown by parol evidence, and thus a different effect be given to it from what its contents alone would entitle it to receive.*

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

A. C. & M. H. Ellis, for the appellant.

R. C. Elliott, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and DONOHUE, J., concurred.

Judgment affirmed, with costs.

* *Blossom v. Griffin*, 8 Kernan, 569; *Hutchins v. Hebbard*, 34 N. Y., 24-26; *Seymour v. Cowing*, 1 Keyes, 533; *Barker v. Bradley*, 43 N. Y., 316-319; *Bostwick v. Baltimore & Ohio R. R. Co.*, 45 id., 712.

SEMANTHE S. ISHAM, EXECUTRIX OF THE LAST WILL AND
TESTAMENT OF PIERREPONT ISHAM, DECEASED, v. SARAH
A. DAVISON AND OTHERS.

Promissory note—false representations—when a defense.

Action upon two promissory notes, made by defendant's to the order of plaintiff's testator. Defendant set up as a defense, that the notes were given in part payment of a farm, purchased of the plaintiff's testator; that the party selling the land for him, represented the land sold to cover a certain cedar knoll, which the defendant asserts it did not, and that damages to a much larger extent than the notes had resulted. The proof showed that the notes were given after a full knowledge of the fact of the real extent of the land, and after efforts had been made by those acting with defendants to purchase the knoll, and that after the notes came due, promises were made to pay on a note given, as those were, with full knowledge or means of knowledge of the extent of the purchase. *Held*, that the law will not sustain such a defense.*

APPEAL from a judgment entered in favor of the plaintiff on the verdict of a jury. This case has already been before the Court of Appeals,† where it was decided that the answer interposed in the case, set up matter constituting a counter-claim and required a reply.

S. C. Conable, for the appellant.

W. P. Prentice, for the respondent.

Opinion by DONOHUE, J.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed.

* *Weeks v. Burton*, 7 Verm., 6, 7; 2 Bell, 608; 23 Wend., 200.

† 52 N. Y., 237.

JOHN STEWART OXLEY, APPELLANT, v. OLIVER K. KING
AND OTHERS, RESPONDENTS.

Consignes — advances by.

Tobacco was consigned to the plaintiff by S. & E., on which he made advances, the business being transacted through the defendants, who were also in advance to S. & E. To secure the defendants, S. & E. authorized them to draw on plaintiff for any balance on the shipment in his hands. Defendants drew on plaintiff for \$1,000, and the draft was accepted by him for, and charged to the account of S. & E. The amount realized upon the sale of the tobacco, was not sufficient to repay the advances made by the plaintiff. *Held*, that the defendants were not liable for the deficiency arising upon the sale; the evidence showing that the advances were made, not to them, but to S. & E.

APPEAL from a judgment in favor of the defendants, entered upon the report of a referee.

Tracy, Olmstead & Tracy, for the appellant.

Beardslee & Cole, for the respondents.

Opinion of DONOHUE, J.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed.

ROBERT P. GETTY ET AL., RESPONDENTS, v. HENRY F.
SPAULDING ET AL., APPELLANTS.

Amendments of pleading after new trial ordered — power to allow.

The court has power, on special motion made on notice, to allow a supplemental and amended complaint to be served after a new trial ordered by the Court of Appeals; the facts still remaining essentially the same as alleged in the original complaint, though more minutely and particularly stated; the parties plaintiff being changed in conformity with a transfer of the interests of the original parties. That the demand for judgment differs very materially, in the amended complaint, from that in the original, is not important, as any relief consistent with the facts may be given under section 275 of the Code.

AN appeal from an order allowing plaintiff to serve a supplemental and amended complaint, after a judgment of the Commission of Appeals, reversing a judgment of the General Term, affirming a judgment ordered for defendant at Special Term and ordering a new trial. In this case, the order allowing the amendments was twice before the General Term, and two opinions were written by DANIELS, J.

John E. Develin, for the appellants.

F. N. Bangs, for the respondents.

Opinions by DANIELS, J.

Order affirmed.

GOTTLIEB GRISSLER AND ANOTHER v. JOSEPH R. STUYVESANT.

Motion to revive action — reference — action.

This action was brought to restrain defendant from continuing proceedings, commenced by him to recover possession of certain premises occupied by the plaintiffs. The plaintiffs obtained an injunction, giving an undertaking in the sum of \$5,000. The injunction was subsequently dissolved, and defendant's demurrer to the complaint sustained, and judgment given for costs. Defendant having died, his executor made a motion to revive the action, in order to have a reference to compute the damages under the injunction. The motion was denied, and, upon appeal, this order was affirmed, the court holding that the appellant's representatives could obtain all their rights by bringing an action upon the undertaking.

APPEAL from an order, denying a motion made by the executor of defendant to revive the action.

Douglass Campbell, for the appellant.

John J. Townsend, for the respondents.

Opinion by LAWRENCE, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, with costs.

LAZARUS HALLGARTEN AND OTHERS, RESPONDENTS, v.
WILLIAM ECKERT AND OTHERS, APPELLANTS.*Order — power of justice at Special Term to vacate.*

This action was tried before a jury, and a verdict rendered for plaintiffs; defendants appealed to the General Term, and a case was settled and served; the General Term reversed the judgment and ordered a new trial upon a specific objection; after the entry and service of the order of reversal, plaintiffs obtained an order from Mr. Justice DANIELS, allowing them to apply for a resettlement of the case by striking out this exception, and an order striking it out was subsequently made by Mr. Justice VAN BRUNT, from which order an appeal was taken to the General Term, where it was affirmed by default; subsequently a motion was made to have the orders of Justices DANIELS and VAN BRUNT vacated, which was denied. *Held*, that this was proper; that to grant the motion would be to allow one justice at Special Term to reverse and vacate the order of another justice at Special Term; that no such practice exists, nor is there any provision of the Code which permits it.

APPEAL from an order made at Special Term, denying a motion to vacate and set aside certain orders made in the case.

Abel Crook, for the appellant.

Lewis Sanders, for the respondent.

Opinion by LAWRENCE, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, with costs.

JOHN JAY, RECEIVER, ETC., RESPONDENT, v. WILLIAM H.
DE GROOT AND OTHERS, APPELLANTS.

Practice — death of party pending appeal — substitution.

An order of the General Term, determining an appeal from an order, made when the representatives of a party, dying pending the appeal, were not properly before the court, is irregular, and may be set aside on motion at Special Term.

APPEAL from an order of the Special Term denying a motion. The death of a party respondent, during appeal in this case, appeared only by suggestion in the points of counsel. The hearing was directed to stand over, to enable the appellant to bring before the court the proceedings in revivor, or to bring the representatives of the deceased before the court.

Joshua M. Van Cott, for the appellants.

Mr. Chatfield, for the respondent.

Opinion by DAVIS, P. J.

DANIELS and DONOHUE, JJ., concurred.

THE CONTINENTAL BANK NOTE COMPANY, RESPOND-
ENT, v. THE INDUSTRIAL EXHIBITION COMPANY,
APPELLANT.

Order of reference — long account.

The complaint contained two counts, each for work, labor and materials. The services were performed, and materials furnished, in engraving and printing a large number of bonds, coupons and certificates. From the schedule appended to the complaint, it could not certainly be determined whether the cause was referable. Plaintiff's agent made an affidavit, which was used on the motion, which stated positively that the trial of the action would require the examination of a long account. The answer was a general denial, and the affidavit of plaintiff's agent was in no way controverted; *held*, that the court had sufficient before it, to justify the making of an order referring the cause.

APPEAL from an order, made by Mr. Justice LAWRENCE, referring this action to a referee to hear and determine the whole issues therein.

John L. Cadwalader, for the appellant.

Jos. J. Marrin, for the respondent.

Opinion by DANIELS, J.

Order affirmed, with costs.

T. HASKINS DUPUY, RESPONDENT, v. CHARLES P. WURTS,
EXECUTOR OF THE LAST WILL AND TESTAMENT OF MARTHA P.
WURTS, DECEASED, APPELLANT.

Extra allowance—power of court to grant.

The Supreme Court has power, under section 818 of the Code, to grant an allowance in appeals from the Surrogate's Court, nor is this power affected by the fact that an allowance has already been granted in the case by the surrogate.

The case of *Seguins v. Seguins* * followed, and distinguished from the cases of *Wolfe v. Van Nostrand* † and *The People v. The N. Y. Central R. R. Co.* ‡ The latter cases hold that appellate courts cannot grant the allowance, because the statute gives the same, by way of indemnity, for the expense of the trial in the courts of original jurisdiction. But, by section 818 of the Code, the appellate court is, *pro hac vice*, made the court of original jurisdiction.

APPEAL from an order made by Mr. Justice BRADY, on the 29th of December, 1873, granting a motion for an allowance to the respondent's attorneys, and fixing such allowance at \$1,000.

S. P. Nash, for the appellant.

F. R. Coudert, for the respondent.

Opinion by DAVIS, P. J.

DANIELS and LAWRENCE, JJ., concurred.

Ordered affirmed, with costs.

* 8 Abb. [N. S.], 443.

† 2 N. Y., 570.

‡ 29 id., 428.

**ROBERT HUSTON, APPELLANT, v. JOHN H. WEBER AND
OTHERS, RESPONDENTS.**

APPEAL from a judgment in favor of the defendant, recovered upon a trial at circuit, without a jury. The principal point in the case, and the only one considered in the opinion delivered at the General Term, was, whether or not the plaintiff was the owner of the draft, for negligence in the collection of which, this suit was brought. The judge at the circuit held that he was not, and the General Term affirmed this decision.

Simon Sterne, for the appellant.

A. R. Dyett and R. W. Townsend, for the respondents.

Opinion by DANIELS, J.

DAVIS, P. J., and DONOHUE, J., concurred.

Judgment affirmed, with costs.

**PHOEBE DEAS, APPELLANT, v. TOWNSEND WANDELL
AND OTHERS, RESPONDENTS.**

APPEAL from a decree of the surrogate of the city and county of New York, admitting to probate the last will and testament of Jane Ann Fowler, deceased.

Probate of the will was contested on the ground that the testatrix was of unsound mind, and that she was induced to execute the will by fraud, imposition and undue influence. The surrogate admitted the will to probate, and the General Term, after reviewing the evidence in the case, affirmed his decision.

Charles Matthews, for the appellant.

Homer A. Nelson, for the respondents.

Opinion by DONOHUE, J.

DAVIS, P. J., and DANIELS, J., concurred.

Decree affirmed.

ANSON WILLIS, RESPONDENT, v. JAMES WEAVER, APPELLANT.

Verdict — excessive damages.

APPEAL from a judgment, entered on a verdict in favor of the plaintiff, and from an order denying a motion for a new trial.

The judgment in this case was reversed, on the ground that the verdict of the jury was excessive, and contrary to the evidence in the case.

E. More, for the appellant.

William P. Chambers, for the respondent.

Opinion by DAVIS, P. J.

DANIELS and DONOHUE, JJ., concurred.

Judgment reversed and new trial ordered, with costs to abide the event.

GILBERT T. REEDER, APPELLANT, v. CHARLES G. SCHNEIDER AND ANOTHER, RESPONDENTS.*Specific performance — liens, discharge of, before tender.*

An action for specific performance, cannot be maintained, when, at the time the contract is to be performed, there are existing liens on the premises to be conveyed, which are not provided for in the contract, although the holders agree to discharge them on receiving an assignment from the seller, of the obligation to be executed by the purchaser under the provisions of the contract to him.

Hinckley v. Smith (51 N. Y., 21) followed.

APPEAL from a judgment of the Special Term, dismissing the plaintiff's complaint.

Edward T. Bartlett, for the appellant.

Daniel T. Walden, for the respondents.

Opinion by LAWRENCE, J.

DAVIS, P. J., and DANIELS, J., concurring.

Judgment affirmed, with costs.

THE NEW YORK FLOATING DRY DOCK COMPANY,
RESPONDENT, v. EDWARD B. SEAMAN, CAPTAIN OF THE
PORT, AND JAMES M. THOMPSON, ONE OF THE HARBOR
MASTERS, APPELLANTS.

THIS action is brought to restrain the defendants from removing a floating dry dock, belonging to the plaintiff, from the slip adjoining pier No. 49. The plaintiff procured a temporary injunction, and, upon appeal to the General Term, the court decided to continue the injunction until the cause could be tried. No reasons were assigned.

William Allen Butler, for the appellants.

E. C. Benedict, for the respondent.

Opinion by LAWRENCE, J.

DANIELS, J., concurred.

. HENRY V. POOR, RESPONDENT, v. HENRY C. BOWEN,
APPELLANT.

APPEAL from a judgment in the Supreme Court, entered on the report of a referee in favor of the plaintiff.

"The case is so purely one of fact, on which the referee has found, that it cannot be disturbed."

George C. Holt, for the appellant.

Isaac V. French, for the respondent.

Opinion by DONOHUE, J.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed.

THE PEOPLE EX REL. JOHN T. BAKER, v. THE BOARD
OF APPORTIONMENT.

Appeal papers — correction of — when not allowed after argument.

A motion for leave to amend appeal papers after argument and decision at General Term, on the ground that the correction of a mistake therein, would show that a point decided against the applicant, had been waived, will be denied when it appears that the point was argued, and the applicant supposed it not well taken, and, on the decision, finding himself mistaken, made the application for the correction.

MOTION for leave to amend appeal papers.

Opinion by DONOHUE, J.

Motion denied.

JULIUS A. CANDEE, ASSIGNEE, ETC., OF DE WITT C. WEEKS,
RESPONDENT, v. WALTER KEELER, APPELLANT.

IN this case, the clerk of the court states that the opinion of DONOHUE, J., has been lost.

Alfred McIntire, for the appellant.

Luther R. Marsh, for the respondent.

Judgment affirmed.

Cases

DETERMINED IN THE

FIRST DEPARTMENT

AT

GENERAL TERM,

May, 1874.

THE QUASSAIC NATIONAL BANK OF NEWBURGH,
APPELLANT, v. CHARLOTTE A. WADDELL, RESPONDENT.

Married women — separate estate, when bound — carrying on business.

Where the consideration of a debt contracted by a married woman is one going to the direct benefit of her estate, or for the benefit of herself on the credit of her estate, the intention to charge the separate estate need not be stated in the contract or instrument evidencing the indebtedness.

Defendant, a married woman, having a separate estate, opened a bank account with plaintiff in 1860, receiving a pass-book, and depositing money to her credit either by separate deposits made by her or the proceeds of her own notes discounted for her by the bank, which money she drew out from time to time by check. The account was continued until 1863, when the note in suit was given for the balance due to the plaintiff upon the account. The referee found that the notes, for which the note in suit was given, were discounted on the credit of her separate estate and for her benefit.

Held, that she was liable upon the note.

A part of the money borrowed by defendant was so borrowed to pay interest on mortgages on real estate belonging to her. *Held*, that this was a debt created for the benefit of her separate estate.

Defendant owned, as her separate property, a place near Newburgh, of twenty acres, which she managed herself, buying what was necessary for it, paying for such purchases sometimes in money, sometimes by check and sometimes by note, and hiring persons to work on the place.

Whether or not this was a *business* within the act of 1863, *quere?*

APPEAL from a judgment in favor of the defendant entered upon the report of a referee. The facts are stated in the opinion.

H. R. Anderson and *R. E. Deyo*, for the appellants, claimed that the defendant was liable, because the debts were contracted on the credit of her separate estate and for her own benefit. (*Gardner v. Gardner*, 7 Paige, 112; S. C., 22 Wend., 526; *Jaques v. Methodist Episcopal Church*, 17 Johns., 548; S. C., 3 John. Ch., 77; *Yale v. Dederer*, 18 N. Y., 265; *Colvin v. Currier*, 22 Barb., 371; *Fireman's Ins. Co. v. Bay*, 4 id., 414; *Albany Fire Ins. Co. v. Ray*, 4 N. Y., 9; *Owen v. Cawley*, 42 Barb., 105-118; S. C., 36 N. Y., 600), and that, where such was the case, the intention to charge the separate estate need not be stated in the contract. (*North American Coal Co. v. Dyett*, 7 Paige, 9; S. C., 20 Wend., 570; *Curtis v. Engel*, 2 Sandf. Ch., 287; *Ballin v. Dillaye*, 37 N. Y., 35-37, 38.)

James M. Smith, for the respondent, insisted that the intention to charge her separate estate should appear in the note, and that it could not be proved by parol. (*Yale v. Dederer*, 22 N. Y., 456; *White v. McNett*, 33 id., 371; *Second National Bank of Watkins v. Miller*, 2 N. Y. Sup. Ct. Rep., 104; *Shorter v. Wilson*, 4 Lana., 114.)

DAVIS, P. J.:

This action was brought on a promissory note, made by the defendant, for a balance due on her general bank account with plaintiff.

The learned referee has found that, at the time of the several transactions between the bank and the defendant, the defendant was a married woman and wife of one William O. H. Waddell, and owned a house and about twenty acres of land at Newburgh; that prior to 1860, she had been in the habit of occasionally getting a note discounted at plaintiff's bank for her own benefit; that in the year 1860, she opened a bank account, receiving a pass-book, and depositing money to her credit either by separate deposits made by her, or the proceeds of her own notes discounted for her by the bank, which money she drew out from time to time by check; that she managed her place, at Newburgh, herself, buying what was

necessary for it and paying for such purchases sometimes in money, sometimes by check upon the plaintiff, and sometimes by her own note; that she hired persons to work upon the said place, repairing her house and ground, and paid the persons so employed herself, by check or her note, or in money; that she was living with her husband; that he was away during the week, returning on Saturday and remaining till Monday or Tuesday; and that he did something for the support of the family; that at the time of obtaining the loan at plaintiff's bank, the defendant stated that said place was hers, and she was carrying it on and wanted to open an account with plaintiff; that she obtained money of plaintiff by discount of her own note, which moneys she stated were to be used for the business purposes of her place, and on one occasion to pay interest upon mortgages then upon the said place, and the notes thus discounted for the defendant by the plaintiff were discounted on the credit of her said separate estate and for her benefit; that the account so opened at the bank was continued from 1860 to the time the note in suit was given, a period of about three years; that subsequently to opening the account she gave a chattel mortgage on the furniture in her house, which was her separate estate, to secure the moneys then or thereafter to be advanced, but nothing was realized on that mortgage; that she also gave a mortgage on her real estate, on which was realized a small surplus on the sale of the property on a prior mortgage; that defendant's place was wholly managed by herself, and that such management consisted in the usual superintendence and direction of a household and of outdoor farm laborers and servants; that defendant did not carry on any trade or business during the period of her dealings with plaintiff; "that she had source of income irrespective of her said property at Newburgh, and that there was no evidence satisfactorily showing that any of the specific sums of money obtained by defendant of plaintiff were ever used for the benefit of the defendant's separate estate."

And upon these facts the referee reported, as a conclusion of law, that plaintiff was not entitled to any relief, and that defendant was entitled to judgment, with costs.

It is very apparent, from the facts found in this case, that the debt of the defendant to plaintiff was contracted on the credit of

her separate estate and for her own benefit. She did not, in respect to it, occupy in any sense the relation of surety, but was in all respects the principal debtor. The question is not, therefore, the one involved in *Yale v. Dederer*,* where it was sought to charge the separate estate of a married woman for a debt created "in no way for the benefit of such estate, but as surety merely for her husband." That case adjudged that, to charge the separate estate under such circumstances, the intention so to charge must be expressed in the note or instrument, or indicated in such form as to create a specific charge. The judges who pronounced the several opinions of the court, recognize a different rule where the debt is created by the wife herself for the benefit of her separate estate or on its credit. Judge HARRIS says: † "I think the equitable rule is that which has been invariably adopted in this State, which is, that where the intention to create the charge has not been expressed, and can only be implied from the fact that she has become indebted either individually or jointly with her husband, it must appear that the debt was contracted for the benefit of her separate estate, or for her own benefit, upon the credit of her separate estate, before the estate can be charged with its payment;" and when the case came a second time before the court, Judge SELDEN said: ‡ "It is plain that no debt can be a charge which is not connected by agreement, either express or implied, with the estate. If contracted for the direct benefit of the estate itself, it would of course become a lien upon a well-founded principle that the parties so intended, and in analogy to the doctrine of equitable mortgage for purchase money."

Before our "married woman" statutes, it was the settled doctrine of courts of equity that where the consideration of a debt contracted by a married woman is one going to the direct benefit of her estate or for the benefit of herself on the credit of her estate, the intention to charge the separate estate need not be stated in the contract or instrument evidencing the indebtedness.

In the *North American Coal Co. v. Dyett*, § the Chancellor held that a *feme covert* as to her separate estate is to be considered as a *feme sole*, and may bind such separate estate for the payment of debts contracted for its benefit or for her own benefit, upon the

* 18 N. Y., 265; Id., 23 Id., 450.

† 18 N. Y., p. 284.

‡ 23 N. Y., 460.

§ 7 Paige, 9.

credit of her separate estate. The case was affirmed in the Court of Errors.*

The same rule was repeated by the Chancellor in *Gardner v. Gardner*; † and in the same case, when reversed on other points in the Court of Errors, COWEN, J., says: "The better opinion is, that separate debts, contracted by her expressly on her own account, shall in all cases be considered an appointment or appropriation for the benefit of the creditor as to so much of her separate estate as is sufficient to pay the debt."

Vice-Chancellor SANDFORD reiterates this rule in *Curtis v. Engel*, ‡ saying that "it must be shown that the debt was contracted for the benefit of her separate estate, or for her own benefit upon the credit of the separate estate." *Yale v. Dederer* does not conflict with these cases, but distinguishes and approves them, and they are recognized as correct expositions of the law in the later cases. §

In the last of these cases, HUNT, Commissioner, says: "Under our decision the liability arises *ipso facto* where the debt is for the benefit of her estate. Where she incurs the liability for another, there is required then the further condition that the intent to make the charge must be declared in the contract creating the indebtedness."

In the case before us, Mrs. Waddell undisputedly contracted the debt for herself. She received the moneys, or checked against them, for her own use. She availed herself of the credit which the ownership and possession of a separate estate conferred upon her and incurred the indebtedness with knowledge that the bank was giving credit to herself alone, relying upon her separate estate as the source of payment. And so the learned referee has found, upon abundant evidence, that the notes (for which the note in suit was given) were discounted on the credit of her separate estate and for her benefit.

This brings the case directly within one of the alternatives of the rule in equity, as settled by the authorities above cited.

The complaint in the case contains averments sufficient to uphold a judgment in the nature of the equitable decree rendered in the

* 20 Wend., 570.

† 7 Page, 112.

‡ 2 Sandford Ch., 287.

§ *Ballin v. Dillaye*, 37 N. Y., 35; *Corn Exchange Insurance Co. v. Babcock*, 42 Id., 613.

several suits in chancery above referred to; and it is settled that, under our present system, the party is not to be turned out of court because his prayer for judgment indicates a conception on his part that his remedy is a legal rather than an equitable one.*

It may be added that the evidence in this case showed, and the referee has found, that a part of the money borrowed by defendant was so borrowed to pay interest on mortgages of her real estate. This having been done on her separate credit cannot well be otherwise held than to have been a debt created for the benefit of her separate estate.

The finding of the referee, that "there is no evidence satisfactorily showing that any of the specific sums of money obtained by the defendant of the plaintiff was ever used for the benefit of the defendant's separate estate" seems to have led him to the conclusion that this action could not be maintained. The finding is not that *in fact* the money was not so used, but that there is an absence of satisfactory evidence of such fact. The presumption upon the other facts found by the referee, and from the testimony as to what transpired at the time the bank account was opened, is very strong that the money was used for her separate estate, and if the fact itself was very material, it devolved upon the defendant to rebut the presumption.† But we think the fact not material where it clearly appears that the debt was created by the married woman as her individual debt, for her own benefit, on the credit of her separate estate.

We think, also, that there was sufficient evidence to render the defendant liable in this case *at law*, as a *feme sole*, under the existing statutes.

The statutes provide that a married woman may carry on any trade or business on her sole, separate account; and the third section of the act of 1862‡ gives to any married woman, possessed of real estate as her separate property, the right to do any act, with reference to the same, with like effect as if she were unmarried; and the seventh

* Phillips v. Gorham, 17 N. Y., 270; 23 id., 357; Corn Ex. Ins. Co. v. Eabcock, 43 id., 646; 20 id., 62; 24 id., 45.

† Gardner v. Gardner, 7 Paige, 112; 1 White & Tudor's Leading Cases in Equity 824.

‡ Chapter 172, p. 343.

section of the same act declares that any married woman, while married, may sue and be sued, in all matters having relation to her sole and separate property, in the same manner as if she were sole.

The defendant owned, as her separate property, a place at or near Newburgh, of twenty acres. The referee has found that she "managed her said place herself, buying what was necessary for it, paying for such purchases sometimes in money, sometimes by check on plaintiff, and sometimes by her note;" that she hired persons to work on her said place, repairing her house and grounds, paying them in like manner; and again, in the eleventh finding, "that the said place was wholly managed by the defendant, and that such management consisted in the usual superintendence and direction of a household, and of the out-door farm laborers and servants."

But he finds also that she "did not carry on any trade or business during the period of her dealings with plaintiff." This last finding should be construed as intending to find that what she did, on and about her place, was not a trade or business within the meaning of the statute.

We think the carrying on of such a place, if managed as a farm, involving the necessity of employing and paying farm laborers, may be a *business* within the meaning of the statute. Farming is not only a business, but as important a one as any other occupation, and we should have no difficulty in holding that a married woman who carries on farming is within the protection of the statute, and subject to its liabilities.

But, under the third and seventh sections of the act of 1862, a married woman owning real estate as her separate property is empowered to do any act in reference to it as if she were unmarried, and she "may sue and be sued, in all matters having relation to her sole and separate property," in the same manner as if she were sole. If, therefore, she can carry on a place like that of Mrs. Waddell, employing labor, improving and cultivating as a farm or otherwise her separate property, it is not easy to see why she may not be sued upon a note given to borrow money, which she avows is to be used for such purposes, and, *a fortiori*, why she is not liable for moneys borrowed to pay off incumbrances on her property.

The law takes off for her protection all the embarrassment of the married relation in respect of separate real estate, and makes her in

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regard to it a *feme sole, pro hac vice*, and it continues that peculiar condition in all matters having relation to such separate property as well when she is sued as when she sues. *

The judgment should be reversed and a new trial granted, with costs to abide event.

DANIELS and WESTBROOK, JJ., concurred.

Judgment reversed and new trial ordered, costs to abide the event.

RACHEL HOPPOCK AND OTHERS, APPELLANTS, v. JOHN C. TUCKER AND OTHERS, RESPONDENTS.

Will—intention—words must give way to—legatees taking as a class or as individuals.

Where the general scheme of a will shows that the testator intended to treat certain legatees as a class, the fact that the several legatees are specifically named in the bequest, and that the gift is to them "*in equal proportions, share and share alike*," will not have the effect of preventing the intention, to treat them as a class, from prevailing.

APPEAL from a decree of the surrogate of New York, made September 9, 1873, in the matter of the final accounting of the executors of the last will and testament of Jacob Hoppock, deceased.

The testator, after making certain specific bequests, in the seventh clause of his will, directs his executors to divide the residue of his estate (including all legacies which for any reason should fail to take effect, and also a sum set aside as a provision for his widow, in lieu of dower, in case she did not accept it, and if she accepted it, then that sum on her death) into six equal shares. The eighth, ninth, tenth and eleventh clauses of the will are as follows:

"Eighth. And one of such equal sixth parts or shares of all my said residuary estates and property, I do give, devise and bequeath unto my son Moses Allen Hoppock. Ninth, one other of such equal sixth parts or shares I do give, devise and bequeath unto my son Larison Hoppock. Tenth, one other of such equal sixth parts or

* *Frecking v. Roland*, 53 N. Y., 422.

shares I do give, devise and bequeath unto my daughter Carolino Virginia, wife of Dudley M. Ferguson. Eleventh, out of one other of such equal sixth parts or shares I do give and bequeath the sum of \$10,000 unto my grandson Edward A. Hoppock, son of my said son Moses Allen Hoppock, and the remainder of the said last mentioned equal sixth part or share of my said residuary estates and property I do give, devise and bequeath, in equal proportions, share and share alike, unto John Campton Tucker, Hubert V. W. Tucker and William Edgar Tucker, the children of my deceased daughter Ann Maria, late wife of John C. Tucker."

By the twelfth, thirteenth and fourteenth clauses of said will the remaining two-sixths are given: of one-sixth, two-thirds to his son William Henry Hoppock, and the remaining one-third in trust for the life of Lavinia, wife of Wm. H. Hoppock. The last remaining sixth to his executors, in trust for his daughter Josephine E. Demarcy. In the seventeenth clause he directs: "In order that there may be a fair and impartial division of my residuary estates and property aforesaid amongst my children, it is my will, and I do order and direct, that the following charges be made against the respective shares," etc.

William Edgar Tucker died before the testator.

The surrogate, by his decree, awarded the share of William Edgar Tucker to John Campton Tucker, Jr., and Hubert V. W. Tucker, holding that the intention of the testator was that the three last-mentioned persons should take as a class, and that the death of either before the testator would work, in law, a survivorship in favor of the others of that class.

Joseph A. Welch, for the appellant. The general rule is that property given by a will to a plurality of persons as tenants in common, if one died in lifetime of testator, his share becomes intestate estate. (1 Jarman on Wills, 295; Roper on Legacies.) The words "*in equal proportions*" or "*share and share alike*," create a severance of the interests. (2 Jarman on Wills, 162; 2 Kent Comm., 351; *Westcott v. Cady*, 5 Johns. Ch., 334; *Right v. Compton*, 9 East, 276; *Lashbrook v. Cock*, 2 Mer., 70; *Perkins v. Baynton*, 1 Bro. C. C., 118; *Campbell v. Campbell*, 4 id., 15; *Bunch v. Hurst*, 3 Desaus., 228.) Legatees are to be treated as a

class, only when the individuals intended are to be ascertained by contingent events. (1 Jarman on Wills, 295-6.) The designation of the individuals makes them individual legatees. (*Downing v. Marshall*, 23 N. Y., 373-4.)

John E. Parsons, for the respondent. The intention of the testator must govern. (*Barber v. Barber*, 3 Myl. & C., 688-697.) The rule, that designation by name makes bequests to individuals and not to a class, not denied, unless a contrary intention appears in the will. (*Bain v. Lescher*, 11 Sim., 397; *Knight v. Gould*, 2 Myl. & C., 295.) The whole will must be considered. (Williams on Exrs., 971; *Finlay v. King's Lessee*, 3 Pet., 346; *Smith v. Bell*, 6 Pet., 68.) The words "*in equal proportions, share and share alike*," are not important. The Tuckers take as tenants in common. There is no survivorship, unless they take as a class; if they take as a class, it does not matter whether they take by language which makes them tenants in common or joint tenants. (*Downing v. Marshall*, 23 N. Y., 366, 373, 374.)

DAVIS, P. J.:

The testator, after first making provision for the payment of his debts and funeral and testamentary charges and expenses, and for his widow during her life, and after making certain specific bequests, proceeds to divide the residue of his estate, real and personal, into six equal shares or parts. His language indicates in strong and clear terms his intention that this equal division shall apply to and embrace every remaining portion of his property, including not only the provision for his widow if she does not accept the same in lieu of dower, and the remainder thereof after her decease if she shall accept, but also "all legacies which for any reason shall fail to take effect." There can be no doubt, therefore, but that the division to be made into six equal shares is to embrace the whole residue, for the purpose of carrying out the scheme of disposition contained in the next following provisions of the will. Nor can there be any doubt that the number of his children dictated and controlled the number of shares. The testator had had six children (one of whom was deceased), amongst whom or their families he set about making a distribution of the

six parts into which he had directed his estate to be divided. To each of his living children he gives directly, or in trust for his or her benefit, one of such equal sixth parts, carefully making provision for the issue of such child in case of his or her death before the death of the testator. His deceased child was "Ann Maria, late wife of John C. Tucker," who had left her surviving three children, John Campton Tucker, Hubert V. W. Tucker and William Edgar Tucker, all of whom were living at the time of the making of the will. Out of the sixth part (which may be said to represent Ann Maria's share) the testator gives \$10,000 to his grandson, Edward A. Hoppock, and the remainder of such sixth part he gives, devises and bequeaths, "in equal proportions, share and share alike, unto John Campton Tucker, Hubert V. W. Tucker and William Edgar Tucker, the children of my deceased daughter, Ann Maria, late wife of John C. Tucker."

William E. Tucker having died before the testator, unmarried, leaving no descendants, and leaving him surviving his two brothers, the only surviving children of said Ann Maria, the question is whether the share that would have come to William, had he outlived the testator, has lapsed or has survived to his brothers as representing a class, to wit, the children of Ann Maria.

The seventh clause of the will sheds a strong light upon the intention of the testator, both as respects his design to make the division include the whole residue of his property, and to divide it so that his six children should stand upon what he deemed to be an equal and impartial footing. It must be seen, I think, from that provision of the will, that the testator intended that each child, or the family of each child, should take the share given to him or them in such manner that it should pertain to his or her children as a class, and not as separate individual legatees.

The testator says: "In order that there may be a fair and impartial division of my residuary estates and property aforesaid *amongst my children*, it is my will, and I do order and direct that the following charges be made against the respective shares that is to say, my deceased daughter, Ann Maria, having, during her lifetime, received from me the equivalent of \$1,000, that sum, with interest thereon from the day of my death, shall be charged against *the share of her children* hereinbefore mentioned

and specified in the final settlement of my estate." The testator then proceeds to make like charges against the shares of his other children, so as to accomplish his manifest purpose of giving to each child, whether living or dead, when the will takes effect, what he intends shall be a fair and impartial portion. It is manifest that, in his mind, it was Ann Maria's share that he was giving to his children, just as it was intended to be Caroline Virginia's share that, under the sixteenth clause, should go to her children in equal shares, provided she should chance to die before the testator. And so in respect to each of the other children.

It cannot be questioned that, in giving to Ann Maria's children so much of the one sixth, parceled out to represent her share, apt words are used, unless their significancy is to be controlled by a manifest intention to the contrary, to constitute the several persons named individual legatees or *personæ designatæ*.

The several children of Ann Maria are named, and the gift is to them "in equal proportions, share and share alike;" and ordinarily, under numerous authorities, those words would be construed to be a gift to each grandchild of a separate and individual interest as tenant in common.

This is the doctrine of the elementary books and of authorities too numerous to be cited. But it is another question whether, where the scheme of the will, in all its various provisions taken together, shows that the grandchildren were not named with such an intention, the accident of naming them must have the effect to prevent the intention, to treat them as a class, from prevailing. If, for instance, the testator had followed the eleventh clause, in which the children of Ann Maria are severally named, by the words "they take as a class representing their mother," there could be no doubt that the intention thus expressed would control the ordinary or technical force of any preceding nomination of persons. What the testator has done, seems to me to be as potent a declaration of his intention, though not as clear, as the one supposed.

There is no special force in the words "in equal proportions, share and share alike," taken by themselves, because if the three sons of Ann Maria had not been named, those words would have had no effect beyond fixing the proportions of the children as a class. They are entitled to no other effect now, for whether the

Tuckers take as a class or take as individual legatees, those words have their full force as standards of measurement, which is all they were intended for.

The several names of the children of Ann Maria are followed by words of classification, "the children of my deceased daughter, Ann Maria." They were all of her children. It was *her share* that the testator was disposing of after dividing his whole residuary estate into *six equal shares*, representing the number of all his children, and counting the deceased daughter, Ann Maria, as standing for one of the shares; and in consummating his purpose of a fair and impartial division "amongst my [her] children," he specifies the amount that has been received by Ann Maria in her lifetime, which shall be charged "*against the share of her children.*" He nowhere treats that share any otherwise than as he treats the shares of other children, except as he diminishes it by the legacy. It would defeat, as it seems to me, the intention of the testator if the rule of construction claimed by the appellants were applied. The object of all rules of construction is to reach with certainty and precision the intent of the testator. In the absence of counter-vailing intent, manifest in the will itself, the general rules of the decided cases are to be followed and applied as the best means of determining intent; but where the intent is manifest the legal effect of words must give way before it.

We think the conclusion of the surrogate was right, and that the decree should be affirmed.

DANIELS and LAWRENCE, JJ., concurred.

Decree affirmed.

PETER F. RANDOLPH, RESPONDENT, v. CHARLES B. PECK,
IMPLEADED, ETC., APPELLANT.

Note — after dissolution of partnership — consideration.

After the dissolution of a partnership, a note made in the firm name, with the assent of the partners, for a debt due by the firm, is a *valid* obligation.

The debt due by the firm, particularly when an extension of the time of its payment is secured by giving the note, is a sufficient consideration therefor.

APPEAL from a judgment entered on the report of a referee.
The facts in this case are stated in the opinion.

William H. Arnoux, for the appellant.

Charles W. Dayton, for the respondent.

DANIELS, J.:

The complaint set forth the making of a promissory note by the defendants, in all respects the same as the one received in evidence, except that the words "in liquidation," following the signature of the firm name to it, were omitted. This omission was an immaterial variance, and the objection founded upon it properly overruled by the referee. Evidence was given on behalf of the plaintiff, showing that the note was given for the balance of a debt due to the National Butchers' and Drovers' Bank, from the firm of Peck, Randolph & Co., of which the defendants had been members. Before the note was made, the firm was dissolved, leaving the debt unpaid. And the evidence tended to show that the firm name was subscribed to the note by one of the other defendants, by the express direction of the defendant, Peck, who alone appeals, and with the concurrence or assent of the third defendant. This was denied by the defendant, Peck, and other evidence was given to sustain his denial. But the evidence on this point was not so decided either way as to prevent the referee's conclusion upon it from being final. It presented a fairly controverted question of fact upon evidence nearly equally balanced, and the

court, therefore, on appeal, cannot set aside the conclusion deemed by the referee to be sustained by it.

Evidence was also given, by the defendant, Peck, for the purpose of showing that the plaintiff, to whom the note was transferred from the bank, and his two sons, who were members of the firm of Peck, Randolph & Co., assumed the payment of debts of that firm. This was derived from the defendant, Peck, and the witness Keller. The former was contradicted, to some extent, upon this subject, by an affidavit which he had previously made, and both he and his witness by the evidence given by the plaintiff as a witness at the close of the case. This evidence rendered this point also a simple matter of fact for the referee to decide, and, having decided it in the plaintiff's favor, the decision cannot be disturbed. There is no such preponderance of evidence against the view he adopted as would justify this court in holding it to be erroneous.

The existing liability of the firm of Peck, Randolph & Co. for the debt, formed a valid consideration for the note, particularly as an extension of the time of payment was secured by means of it. The answer, served on behalf of the defendant, Peck, simply put the note in issue. It was entirely irrelevant to this issue to show the financial condition of the firm of Peck, Randolph & Co., or that the new firm of Randolph Brothers, of whom the plaintiff and his sons, the other defendants, were members, had used any of the funds of the firm of Peck, Randolph & Co., or that the plaintiff was Randolph Brothers' assignee. The evidence was sufficient to sustain the referee's conclusion as to the two substantial facts in controversy. They were, whether the note had, in fact, been authorized by the defendant Peck, and whether the plaintiff had become a party to an agreement with him for the payment of Peck, Randolph & Co.'s debts. As to these, the referee decided in favor of the plaintiff, and that entitled him to the judgment recovered by him, as the note was given for a balance owing to the firm, and had been transferred to the plaintiff.

The judgment should be affirmed, with costs.

DAVIS, P. J., concurred.

Judgment affirmed with costs.

JAMES MURPHY AND OTHERS, APPELLANTS, v. WILLIAM
SALEM AND ANOTHER, RESPONDENTS.

*Power of state courts to enforce demands of a maritime nature—how limited—
chap. 482 of 1862.*

In an action brought upon a bond given by defendants, to procure the discharge of an attachment issued against an ocean-bound vessel, under the provisions of chapter 482, Laws of 1862, to enforce a claim for materials furnished and work and labor performed for and toward the building, repairing, fitting, furnishing and equipping of the vessel, *held*, that so much of the statute as authorized the proceedings to be taken against the vessel for the recovery of the plaintiffs' debt, as one for *repairs* was unconstitutional and invalid, but so much thereof as authorized them to be taken for the recovery of so much of the demand as was for building the vessel was constitutional and valid.

APPEAL from a judgment in favor of the defendants entered upon the report of a referee. The facts are stated in the opinion.

Beebe, Wilcox & Hobbs, for the appellants.

James K. Hill, for the respondents.

DANIELS, J.:

The evidence contained in the case shows that the work and materials for which the plaintiffs claimed to recover upon the trial of this action, were performed and supplied in repairing the steam engine, boilers, propeller and hull of the steamer *Circassian*, while she laid at the city of New York.

And that it was done and supplied at the request and under the employment of her owner, who then resided in that city.

This constituted a demand of a maritime nature, as the steamer was then an ocean-bound vessel, and had been, previous to that time, engaged in the business of commerce and navigation.

The repairs, according to this evidence, seem to have been required and made in order to put her in a proper condition for the continuation of that business.

The demand so created was one which could be sued, prosecuted and recovered in the District Court of the United States as a court of admiralty.

It was within the admiralty and maritime jurisdiction of that court, as it has been defined and declared by the Constitution and laws of the United States, although no lien existed for its security, as the debt was contracted in the home port of the steamer.* And being a demand of that nature within the admiralty jurisdiction of the courts of the United States, the State court, within the provisions of section 9 of the judiciary act enacted by congress, could only afford the plaintiffs the remedy supplied by the common law for the recovery of their debt.†

That remedy is confined to an action against the person of the debtor, which may be enforced by the seizure of his property in cases where an attachment can appropriately issue in such an action.

But it does not include proceedings against the vessel herself as the object proceeded against, as they are provided for by the laws of this State for enforcing certain demands against ships and vessels.

For that reason, the proceedings taken against the steamer for the recovery of the plaintiffs' debt, as one for repairs, were unauthorized, although carried on under the authority of the statute of the State.

The State had no power to provide such a remedy, it being of an admiralty, and not of a common-law nature; consequently the bond which was given to discharge the steamer from arrest on the warrant issued under them, and on which this action was brought to recover the debt, was of no binding effect whatever, so far as the demand accrued for repairs.

That is the rule as the courts have now distinctly settled it, and a re-examination of the reasons sustaining it can be neither necessary nor proper. ‡

But the plaintiffs, in their complaint, have alleged, and the referee, in his report, has found, that their demand against the steamer was for building, as well as fitting, furnishing and equipping her.

* 1 Conkling's Admiralty, 2d ed., 75, and cases cited in note; id., 78; Ins. Co. v. Dunham, 11 Wallace, 1.

† The Belfast, 7 Wallace, 624; Leon v. Galceran, 11 id., 185.

‡ Bird v. Steamboat Josephine, 89 N. Y., 19; Brookman v. Hamill, 43 id., 554. Vose v. Cockcroft, 44 id., 415; Brookman v. Hamill, 46 id., 636.

\$4,567,065. This writ of certiorari was issued for the purpose of reviewing the proceedings of the commissioners in making such amended assessment.

Coles Morris and Michael Cardozo, for the relators.

James C. Carter, for the respondents.

DAVIS, P. J.:

We think the proceedings of the commissioners should be affirmed, for the following reasons:

First. The relators are a corporation created by the laws of this State, and have their principal place of business in the city of New York. As a corporation, their residence is in New York. The ships included in the present assessment are registered in the port of New York, under and pursuant to the United States Registry Act, and the city of New York is, therefore, their home port. They have, and can have, no other, and are not taxable elsewhere. Their *situs* is at the home port for all purposes of taxation. In the case of *Morgan v. Parham*,* the Supreme Court of the United States have very emphatically settled these questions, and reaffirmed the case of *Hays v. The Pacific Mail Steamship Company*,† under which the relators escaped taxation on these or similar vessels in California.

But it is insisted that under our statute the property of the relators, to be taxable, must be physically *within* the territory of the State, and therefore it is not enough that its legal *situs* and ownership are here. We think this position not sound for several reasons. Of course, ships at sea are not in a strict sense within the territory of the State in which they have their home port, but in legal contemplation they are themselves part of the territory (so to speak) of the country of which their owners are citizens or subjects, and they retain all the rights that flow from that fact while engaged in commerce between foreign ports for an undefined period, without any interval of return to the home port. But it is not, perhaps, upon this ground that they are deemed within this State when owned by citizens of the State, for the purposes of taxation. It is

* 16 Wallace, 471.

† 17 Howard, 590.

rather because of the peculiar character of the property, which, though it be used abroad in the business of the owner, does not blend with the business and commerce of any foreign State or territory. The business of the relators' ships in the Pacific is all the while a part of the business carried on in New York under the charter of the company, whence the general management and direction emanate, and to which point returns of all results are made. The ownership and the nature of the business control to establish the home port, where the corporation resides, as the *situs* of the ships themselves, and in legal contemplation we think the vessels used in the business, which have their home port, under the law, at New York, are within the jurisdiction and territory of the State, within the meaning of the general statute declaring what property is taxable.

But for the decision of the court when this case was before under consideration, we should deem this an immaterial question.

The relators, under the statute of 1857,* are taxable only upon their "*capital stock*," which is to be assessed at its actual value, with certain exceptions specially named or referred to in the act. The subject of taxation under this act is the capital stock of the company, and that is, at all times, within the State, although, for the purpose of conducting the business of the company, a portion of its capital may be invested in ships whose commerce is carried on in remote parts of the world. The question to which the commissioners were to look, under the law, was not the *locus* or *situs* of items of property owned by the corporation, but of the company itself, and of its capital stock, and they were in New York, both in law and in fact. It would require a special exemption by statute to authorize the commissioners, in determining the actual value of the capital stock of the company, to strike out the value of property, used in the general business of the company, and contributory to the actual value of the capital stock, because its use was outside of the State, and the articles of property were, therefore, not territorially within the State. We think nothing of that kind was in contemplation under the act of 1857, which intended to create a special system of taxation applicable to corporations, and, *sub modo*,

* Chap. 456, Laws of 1857

to modify all previous general laws; but this is not, perhaps, an open question.

In respect to the money invested in building the ships in Delaware, nothing was shown before the determination to require them to treat the ships in process of building as the property of the company. Before the motion for rehearing, the commissioners had made and filed with the comptroller their certificate. The application for rehearing came too late; but if it did not, the refusal to rehear is not a subject of review on this application. The proceedings should be affirmed.

DANIELS and WESTBROOK, JJ., concurred.

Proceedings affirmed.

ISRAEL R. DALE, RESPONDENT, v. THE BROOKLYN CITY,
HUNTER'S POINT AND PROSPECT PARK R. R. CO.,
APPELLANT.

Damages — horse railroad — negligence.

A person approaching a horse-car (which has stopped for him), and, in so doing, crossing another track and attempting to enter on that side, is not necessarily guilty of negligence contributing to injuries sustained by him by reason of the starting of the car after he has got hold of the handle and has one foot on the step, in which position he is dragged along till struck by a car passing on the adjoining track. It is a question for the jury on the evidence.

Where the evidence shows that injuries continued to exist up to the time of the trial, the testimony of a physician as to plaintiff's condition four months after the injury is admissible.

APPEAL from a judgment, entered at circuit on the verdict of a jury, for \$2,647 and costs, and from an order denying a new trial.

This action was brought to recover damages for injuries sustained by the plaintiff, by reason of the alleged careless starting of the defendant's car while plaintiff, and his wife were in the act of getting upon it.

On December 23, 1867, at six P. M., the plaintiff and his wife, in

stormy weather, crossed one track of the defendant's road, to get upon a car running on the further track, which had been stopped for them. The plaintiff testified that the car was standing still till he got hold of the handle and had one foot on the step, when it started and dragged him some eight or ten feet; he lost his balance and was struck and injured by a car coming in the opposite direction on the other track, while he was hallooing to have the car stopped.

The defendant's counsel requested the court to charge:

1st. If the jury believe the plaintiff's testimony, that when he took hold of car 21, the car started, and he was dragged, or had walked, eight or nine feet toward the car coming from the opposite direction, and that his wife was walking either beside or behind him when he was struck by car 31, he was guilty of negligence which contributed to the accident, and the plaintiff cannot recover.

2d. That it was negligence, *per se*, for the plaintiff to attempt to get on the car from between the tracks under the circumstances.

3d. It was negligence for the plaintiff to be between the tracks under the circumstances of this case.

4th. That the plaintiff, having attempted to cross one of the tracks and to get on the car from between the tracks of the road, having voluntarily placed himself in a dangerous position, was bound to look out for the car approaching from the opposite direction, and it was negligence for the plaintiff not to do so.

5th. That there is no evidence of loss of business as a basis for damages.

John H. Bergen, for the appellant.

Abbott Brothers, for the respondent.

DANIELS, J.:

The case of *Phillips v. Rensselaer and Saratoga R. R. Co.** so far differs from the present one, in its leading facts, as to justify the application of a different principle to its decision.

There the plaintiff attempted to go upon the train while it was in motion, and after failing in the attempt, so far as to be thrown

* 49 N. Y., 177.

off the step, he renewed it, and persisted in doing so, while the speed was increasing, for a distance of about sixty feet, when he came in collision with an object so near the track as to render his projecting body incapable of passing it without injury.

While in the present case, if the evidence of the plaintiff, his wife and his first witness was reliable, the car stopped upon the street, and he, having hold of the handle, with one foot upon the step, was either in the act of assisting his wife to go in, or about to do that, when the car started again, pulled him along, with his hand still on the handle, for eight or ten feet, when he was struck and injured by another car approaching from the opposite direction.

The occurrence took place upon a stormy evening, about as the night had set in.

And it was claimed that the car had stopped, upon a signal being given by the plaintiff and his first witness, to allow himself and wife to approach and enter it from that side of the track.

The evidence given by the driver and conductor of this car, and the driver of the other car, was directly in conflict with that given by and on the part of the plaintiff, but there was no such preponderance either way as to prevent the question, as to what the truth really was, being a proper one for the consideration and decision of the jury.

If they believed the relation given of the facts by the plaintiff and his witness to be correct, as it certainly must be assumed that they did, from the verdict being in his favor, then there was gross negligence, on the part of the driver and conductor of the car he and his wife were about to enter, in starting it in motion again after it had been stopped for that purpose, before that could safely be accomplished.

And if the plaintiff and his wife were upon that side of the car, upon the invitation to be implied from the conductor's stopping the car and opening the door upon that side for the purpose of having them enter it in that way, then he was not necessarily negligent in attempting to do so.

These were facts which the jury could very properly find in his favor from the evidence, and for that reason a nonsuit would have been improper.

The accident happened on the twenty-third day of December,

and the evidence of the plaintiff and his wife tended to show that he was severely injured by means of the concussion, and that his injuries continued to exist at the time of the trial.

It was, therefore, not improper for the court to allow a physician, who saw the plaintiff in the following April, to testify as to what his condition was at that time.

No evidence was given, nor offered, to prove that the diagram presented to the witness correctly represented the locality, condition of the railroad tracks, or the situation of the cars, at the time of the accident, and for that reason there was no error in excluding it from the consideration of the witness to whom it was exhibited.

From the statement, already made of the facts, which the evidence on the part of the plaintiff tended to establish, it is quite clear that the court could not lawfully have charged the first three propositions submitted for that purpose on the part of the defendant, for they substantially required the court to hold that it was negligent for the plaintiff to approach and attempt to enter the car on the side between the tracks. This, under the circumstances, it was not the province of the court to decide, but for the jury, to which it was submitted as favorably as the defendant had any right to require that it should be.

The fifth proposition could not have been correctly charged, because there was evidence that the plaintiff had been prevented from attending to his business by the injuries produced by the collision.

By the fourth proposition, the court was asked to charge that the plaintiff, having voluntarily placed himself in a dangerous position, was bound to look out for the car approaching from the opposite direction, and it was negligence for him not to do so. This could not properly be held, if, as he stated, he was substantially there by the invitation of the conductor, which might be implied from the circumstance that the car had stopped for him and his wife to enter it from that side, and the door had been opened for them to do so.

The jury had the right, under the evidence, to find those facts in the plaintiff's favor, and, if they did so, he could assume that the conductor had concluded that the car could be safely entered in that way.

These circumstances carried an assurance with them that a proper opportunity existed for the plaintiff and his wife to enter the car at that time, on that side, without danger from another approaching in the other direction; and if the plaintiff's evidence was reliable, this was true, for both himself and wife could have safely entered the car before any danger existed from the other, if they had not been prevented from doing so by its being improperly set in motion again before that could be accomplished. Upon this subject the court charged as favorably for the defendant as it could reasonably be required to do.

For the jury were directed that it would be negligent for the plaintiff to attempt to enter the car between the tracks, unless he was substantially invited to do so by the acts of the conductor; and that such negligence would defeat his claim to recover damages for the injury received by him. This seems to be all that the defendant had any right to insist upon, concerning this portion of the case.

The jury had the right, from the evidence given, to conclude that the plaintiff's injuries were severe and probably permanent. And as they must be presumed to have done so from the verdict which they rendered, the sum of \$2,500, the amount of it was not disproportioned to the damages probably sustained by the plaintiff.

There is nothing in the case from which the verdict can be held to be excessive.* There are no other respects in which the defendants claim the case to have been erroneously disposed of at the trial.

The judgment and the order denying a new trial should therefore be affirmed with costs.

WESTBROOK, J. and DAVIS, P. J., concurred.

Judgment and order affirmed with costs.

* Walker v. Erie Railway Co., 68 Barb., 260.

HENRY T. KIERSTED AND OTHERS, RESPONDENTS, v. THE
ORANGE AND ALEXANDRIA RAILROAD COM-
PANY AND OTHERS, APPELLANTS.

Lease—principal, when not bound by covenants of agents—use and occupation.

The plaintiffs demised certain premises in the city of New York to one Smith, the general agent of the defendants; in the lease, which was under seal, Smith was described as the general agent of defendants; he executed the lease individually; the lessee took possession under the lease, and the premises were used to carry on the business of defendants; *held*, that the covenants in the lease were binding upon the lessee, and not upon the defendants as his principals.

The defendants were permitted to occupy the premises, upon the undertaking of the agent that the lease should be ratified by the defendants so as to be binding and obligatory upon them; it never was so ratified; *held*, that they did not thereby become tenants of the plaintiff, nor were they liable for the rent accruing under the lease.

The lessee occupied the premises for some months after the date of the lease; on or about the third of April, having ceased to be the agent of defendants, he left the premises, which were afterwards used and occupied by the new agent, as a ticket-office for the defendants' route, until the twelfth of the ensuing February *held*, that defendants were liable to the plaintiffs for use and occupation.

APPEAL from a judgment entered in favor of the plaintiffs, upon the report of a referee. The facts are fully stated in the opinion.

Joseph C. Jackson, for the appellants. The lease being a specialty, executed by Smith individually, no cause of action thereon existed against defendants. (*Berkeley v. Hardy*, 5 Barn. and Creas. 355; *Townsend v. Hubbard*, 4 Hill, 351; *Lincoln v. Crandell*, 21 Wend., 101; *Jackson v. Foster*, 12 Johns., 488; *Evans v. Walls*, 22 Wend., 324; *Bush v. Cole*, 28 N. Y., 269; *Pumpelly v. Phelps*, 40 N. Y., 67.)

T. C. Cronin, for the respondents.

DANIELS, J.:

The recovery, had in this action, was for the use and occupation of leasehold premises situate in the city of New York, leased by the plaintiffs to the agent of the defendants. The lease was made

the first day of November, 1860, and the term created by it extended from that date until May 1st, 1863. The lessee was described in it as general agent of the Virginia and Tennessee route, comprising the railroads of the defendants. But the premises were leased directly to him, and he alone covenanted to pay the rent reserved by it. He and the plaintiffs respectively executed it under seal.

By its terms, it was binding solely upon them. And one of the plaintiffs, who was examined as a witness upon the trial, testified that it was understood to be sufficient and binding without any further signature to it, and that he did not consider it necessary that any other signature should be added to it, and that he never requested the indorsement of any of the officers of the railroad companies upon it, so that the demise, from the evidence as well as the lease, appeared to have been designed as the lease showed it to have been made. And, as between the plaintiffs and the lessee, the term created by it was effectually vested in him. He occupied the premises under the lease for some months after its date, as the agent of the route, but left them about the 3d or 4th of April, 1861; a day or two before he left, and on the second of that month, another agent, appointed by the defendants, took charge of the premises and remained there. When the lessee was removed and ceased to be the agent of the route, the premises were under the control of a clerk in his employment, who remained there until after the succeeding agent took possession. Before he went into possession, the lessee was removed as the agent of the route, and the second agent was appointed in his place. And he afterward occupied the demised premises in that capacity. How long he occupied them does not clearly appear from the evidence given by him. But no other person seems to have been at any time appointed in his place; and the plaintiff, who was sworn on the trial, testified that the defendants ceased to occupy the premises about the 12th day of February, 1862. The premises were occupied as a ticket-office for the defendants' route. The plaintiff sworn, testified that the rent was paid by the lessee up to the 1st of May, 1861. And it appeared by the evidence of the president of the Orange and Alexandria Railroad Company, that his company contributed its proportion of the amount paid. It also appeared

that the second agent was paid for his services by the defendants, and that monthly reports of the business were made as late as the month of April, 1861. The plaintiff, who was sworn, testified that he never had any relations with the second agent, concerning the lease; did not ask him for the rent, and received none from him. It appeared from the evidence given by this agent that the officers of the defendants were in New York in April, 1861, for the purpose of arranging certain matters, requiring their attention, relating to the business of the route, and including the lease given by the plaintiffs; but they left without accomplishing anything, on account of the difficulties which had then arisen between the southern States and the general government, passing through Baltimore, on their return, by the train preceding the April riot in that city. The lessee himself did not return to the demised premises, and died in the year 1864. These are the facts as they appear to be sustained and exhibited by the evidence. The referee reported in favor of the plaintiffs for the rent accruing between the 1st of May, 1861, up to which time it was paid, and the 12th of February, 1862, when they resumed possession of the demised premises, and interest upon the same.

From the manner in which the lease was taken and executed, the covenants contained in it were binding upon the lessee, and not upon the defendants as his principals. They were his covenants and not theirs.*

But when he was removed from his position as the defendants' agent, and the demised premises were taken possession of by his successor, a very different state of things came at once into existence. Then, by their newly appointed agent to take charge of the business designed to be transacted there, they took the actual possession of the leasehold estate. It seems to have been abandoned by the lessee upon his removal from his position, and the occupancy and control of it taken by his successor for the defendants. This does not appear to have been done by reason of any assignment, in writing, of the lease and term created by it, as the statute required

* Taft v. Brewster, 9 John., 334; Stone v. Wood, 7 Cowen, 452; Guyon v. Lewis, 7 Wend., 26; Spencer v. Field, 10 id., 87; Smith v. Van Nostrand, 5 Hill, 419.

to render it effectual.* And for that reason the defendants did not become liable as assignees. But it may be reasonably inferred from what transpired that the lessee allowed the defendants to possess and occupy the premises leased, by his successor, because he had acquired them only for the purposes of his agency, at the expense and for the benefit of the defendants. The occupancy, after that, was simply that of the defendants, and may be presumed from the circumstances to have been permitted by the lessee, and enjoyed by the defendants, upon the understanding that the rent should afterwards be paid by them. And an occupancy with such an understanding would be sufficient to render the defendants liable for use and occupation under the provisions of the statute of this State,† because it would sustain the conclusion that the defendants had assumed to pay the rent accruing to the plaintiffs during the period of their occupancy. And from that, under the circumstances, a promise to pay could lawfully and properly be inferred, which would sustain a recovery for use and occupation. The action for use and occupation is sustained by a privity of contract, either express or implied. And the contract may be implied from circumstances reasonably warranting the conclusion of its existence. For that purpose, occupancy with the consent of the landlord, or the payment of rent by an under-tenant, will ordinarily be sufficient.‡

When the premises were abandoned by the lessee, without an assignment or transfer of the lease, but simply leaving it, as he did, with the rest of the papers appertaining to the business, and the defendants took the actual possession by their succeeding agent, the lease itself was not an element existing between the plaintiffs and them. They undoubtedly assumed possession, because the premises had been rented for them by the lessee, and they would have been liable, as long as they were used by him in their business, to have protected him against his covenants for the payment of the rent—certainly, so far as to reimburse him for whatever he might be compelled to pay for that purpose. And, as they assumed possession when he was discharged, without acquiring a transfer of the lease, it must have been upon the understanding that they would protect

* 3 R. S., 5th edition, 220, § 6.

† 3 R. S., 5th edition, 87, § 20.

‡ Porter v. Bleiler, 17 Barb., 149; McFarlan v. Watson, 8 Com., 286.

the lessee against the plaintiffs' demand for the rent under his covenant to pay it, by making payment of it themselves.

That, within all the cases, would be sufficient to maintain an action for use and occupation, because a promise to pay it could be implied, from those circumstances, in the plaintiffs' favor. That implied understanding, with the occupancy, would be sufficient for that purpose.* And the liability of the defendants as occupants, when created in that way, would continue as long as they retained the actual or constructive control and possession of the demised premises.† And during that continuance it would not be interrupted by a state of war existing between the general government and the States under whose laws the defendants were created and existed. For as long as they possessed and occupied the premises, they would be bound to pay, notwithstanding such an occurrence.

But while the facts are sufficient to warrant the conclusion that the defendants rendered themselves liable to the action for use and occupation during the continuance of their occupancy, the referee has deduced no such conclusion from them; for, while he has decided and found that they were the tenants of the plaintiffs, he qualified that conclusion so far by the following one (in which he states that they entered under a lease by indenture of deed, executed by the plaintiffs, on the 1st of November, 1860, to one Smith, their lawful agent, executed by him in his individual name, and were permitted to occupy on his undertaking that they would ratify the lease so as to render it binding and obligatory on them, but never did so) as to show that no tenancy existed between the plaintiffs and defendants. These facts show an entry into the possession by the defendants under a special agreement between the plaintiffs and the agent of the defendants, by which the defendants were to render the lease obligatory upon themselves in a particular manner, and that they never afterward did so. They show no liability

* *Corporation of New York v. Dawson*, 2 John. Cases, 835; *Smith v. Stewart*, 6 John., 46; *Bancroft v. Wardwell*, 18 John., 489; *Featherstonhaugh v. Bradshaw*, 1 Wend., 184; *Little v. Martin*, 8 Id., 219; *Williams v. Sherman*, 7 Id., 109; *Wood v. Wilcox*, 1 Denio, 87; *Croswell v. Crane*, 7 Barb., 191; *Hall v. Southmayd*, 15 Id., 82; *Pierce v. Pierce*, 25 Id., 243; *Sylvester v. Ralston*, 31 Id., 286; *Thompson v. Bower*, 60 Barb., 463; *Lawrence v. Fox*, 20 N. Y., 268; *Dingeldein v. Third Ave. R. R. Co.*, 37 N. Y., 575; *Hutchings v. Miner*, 46 N. Y., 284.

† *Hall v. Western Transportation Company*, 84 N. Y., 284.

whatever to the plaintiffs, but an agreement between the defendants and the lessee by which he undertook that they would render themselves liable upon the lease, but afterward failed to do so. Instead of sustaining, it defeats the final conclusion of the referee. For it presents nothing from which a liability can be deduced, but on the contrary shows that nothing of that kind really existed. After the very great labor and attention bestowed by the learned referee upon the case, it would be a source of pleasure to be able to sustain his conclusion as to the defendants' liability. But that cannot be done, because the facts, stated by him, do not warrant the result. And besides that, there is great reason for believing that the facts mentioned by him are not sustained by the evidence.

If the action can be maintained at all, it must be upon the theory that when the lessee was removed he abandoned the possession of the premises with the understanding that they should afterward be occupied and possessed by the defendants; that they should protect him against his liability for the rent by paying it themselves, and that they accepted and occupied the premises by his successor, as their agent, upon those terms. Upon those facts being established and found, no reason now appears why the defendants should not be held liable. But as the case stands, even if the proof will warrant the conclusion that they existed, they have not been found by the referee. For that reason the judgment must be reversed and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and WESTBROOK, J., concurred.

Judgment reversed and a new trial ordered, costs to abide the event.

JOSIAH JEX, RESPONDENT, v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT.

Lease—admissions—admissibility of.

The statements by one member of a board of trustees, not constituting part of the *res gesta*, but made subsequent to and in explanation of what took place in the progress of the negotiation, are not competent evidence against the board or corporation of which he is a member.

APPEAL from a judgment in favor of plaintiff and an order denying a motion for a new trial on the judge's minutes.

The plaintiff rented premises in the city of New York to the defendants, from May 1, 1866, to May 1, 1869, at a rent of \$2,500 a year. In February, 1869, the plaintiff's agent wrote a note to Mr. Simonson, the secretary of the board of trustees of common schools for the Twenty-second ward, stating that the rent for the premises would be \$6,000 per year. Mr. S. laid the letter before the board of trustees, which passed a resolution not to hire the premises, but submitted the matter to the board of education to do as it thought fit. The board of education, June 9, 1869, offered to hire the premises for \$3,000 per year, which proposition was declined. On July 2, 1869, the board of education notified the plaintiff that they had vacated the premises. This action was brought to recover the rent at the rate of \$6,000 a year, alleged to be due August 1, 1869. Considerable evidence, consisting of conversation between the plaintiff and his agent, and the individual trustees and commissioners, was admitted under objection by the defendant. The jury rendered a verdict for plaintiff for \$1,802.74.

A. J. Vanderpoel, for the appellant.

A. R. Dyett, for the respondent.

DAVIS, P. J.:

It was error to admit the statements and admissions of the individual trustees and commissioners to establish the liability of

defendant. Mr. Simonson was one of the trustees of the Twenty-second ward, and secretary of the board of trustees. He was called as a witness for the plaintiff. The plaintiff proved by him, in substance, that in February, 1869, the plaintiff's agent spoke to the witness about the premises then occupied by primary school No. 17, in relation to hiring the premises; that witness told the agent to put his proposition in writing and he would submit it to the board. That the written proposition (before read in the case) was submitted and laid before the board, and the board passed a resolution not to hire the premises, but to submit the matter to the board of education. That this was in April, and was the final action of the board of trustees.

On cross-examination, amongst other things, he testified that he told the agent that the board would not take the premises at that rent (referring to an oral offer of the premises for \$5,000 a year, for three years), that it was too high. That he never made any arrangements with the plaintiff about the premises; that he had no power to make arrangements without submitting the proposition to the board. That his duty was to receive propositions and communicate them to the board, and communicate the answer of the board; that that was all he did in this matter; that he did not remember positively, but had no doubt he communicated the answer of the board to the agent. And on re-direct examination he testified that he did not think he told plaintiff, before the first of May, that the school would remain there at \$6,000 a year.

After the testimony of Mr. Simonson was closed, the plaintiff was recalled in his own behalf and testified that he recollected having a conversation with Mr. Simonson before the first of May. And against defendant's objection and exception, the court allowed him to testify that Mr. Simonson said in that conversation, "that the trustees of the ward had taken the premises for one year at \$6,000 and the taxes, anyhow; that the school would remain there, and that they had no authority to take a lease for three years, without the approval of the board of education."

We think this testimony was incompetent. It was not admissible for the purpose of impeaching the witness by contradiction, because he was plaintiff's own witness, and his credibility was not

open to an attack in the nature of an impeachment.* Nor was it admissible to prove his confessions against the defendant.

He had no power to bind the defendant by admissions; he was not even a member of the board of education, and in no sense their agent, and, as trustee of the ward, was not clothed with any authority to affect defendant by admitting that the board of trustees had taken the premises.

He could not even bind his own board by such an admission; for, while the statements of a trustee, made in the progress of a negotiation, are admissible as *res gestæ*, yet his subsequent admissions of what had transpired are not competent evidence against the board or corporation of which he is a member.

The action of the board of trustees, referred to by Mr. Simonson, was in writing and a part of the records of the board.

A copy of the proceedings in relation to plaintiff's proposition was already in evidence, and, clearly, a subsequent statement by one member of the board was not competent to show, by way of confession, that the board had acted directly the reverse.

It cannot be said that the error did not affect the jury in considering the question submitted to them.

Again, it was error to admit the declarations of the members of the board of education as evidence against the defendant. They were not only the declarations of individuals, but on their face purported to be nothing more; and they were made after the first of May, and related to past transactions, and so were simple confessions.

The plaintiff testified that Mr. Brennan and Mr. Small, two of the members of the board of education, "acknowledged to him, after the first of May, that the board of education was liable for this rent for those premises, and would have to pay it."

The defendant had not, so far as the case shows, authorized these gentlemen to make admissions or do any act on behalf of the defendant touching the leasing of the premises, nor to pronounce opinions on the question of the legal liability of the defendant.

The plaintiff was also allowed to testify that Mr. Brennan said to him, before the first of May, that "they were going to take the premises," and that after the first of May, Mr. Small had a talk with him "about the same tenor."

* Hunt v. Fish, 4 Barb., 824; Richard v. Collin, 24 id., 444.

This evidence should also have been excluded. Nothing occurred subsequently in the course of the trial to render these errors immaterial.

The jury must have given them much weight, and we cannot obviate their legal consequences which entitle defendant to a new trial.

It is very difficult to see how the defendant, "The Board of Education," can be held liable as tenants of the premises for one year, at \$6,000 and taxes, without any action on its own part, because the trustees of the ward negligently held over after the expiration of their former term, or on the ground that plaintiff notified the trustees that if they continued in occupation the rent would be \$6,000 and taxes.

The defendant is not lawfully shown either to have approved or directed such action on the part of the trustees, and it is a question worthy of consideration whether the *quasi* corporation, known as the board of trustees of the ward, had authority to create obligations against the board of education in the manner in which it is claimed by plaintiff the liability to him arose.

But we do not pass upon that question, nor on the point whether this action can be continued in its present form.

The judgment must be reversed, and a new trial ordered, with costs to abide the event.

DANIELS and LAWRENCE, JJ., concurred.

Judgment reversed and a new trial granted, costs to abide the event.

THOMAS M. TYNG, APPELLANT, v. THE UNITED STATES
SUBMARINE AND TORPEDO BOAT CO., RESPONDENT.

Evidence — notice to produce papers.

This action was brought by plaintiff to recover for services rendered and money disbursed in procuring certain patents for the defendant. At the trial, he required the defendant, pursuant to a notice, to produce its certificate of incorporation, the assignment of the invention to one Smith, one of the company's trustees, and the minutes of the meetings of the board of trustees; the books and papers not being produced, the plaintiff produced proof of the certificate of incorporation and the contents of the assignment; and also proved the contents of the minutes so far as to show the entry of the proceedings of the meeting of June ninth, containing the statement that his action in procuring the patents was approved. After the plaintiff rested, the defendant produced and read, against the objection of the plaintiff, the certificate of incorporation, the assignment of the invention, and the record of the meeting of the trustees, held November seventh, at which the statement contained in the record of the meeting of June ninth, approving the acts of plaintiff in procuring the patents, was stricken out; *held*, that the objection could not be sustained as to the certificate of incorporation, because it was filed in the office of the county clerk and was a public record, as accessible to one party as to the other; nor as to the minutes, as the portion read by the defendant was not the portion which the plaintiff wished to prove, but an entirely separate and distinct portion; that the assignment should have been rejected, but, as the plaintiff was not injured by its admission, the judgment would not be reversed for this error.

A party failing, after notice, to produce books and papers in his possession, is not allowed, after having voluntarily withheld them when demanded by his adversary, to introduce them in evidence himself.

APPEAL from a judgment entered on the report of a referee in favor of the defendant.

The defendant in this action is a corporation, formed, on or about the 24th of October, 1865, under the statute of this State providing for the formation of manufacturing corporations.

Its object was to manufacture, sell and use submarine boats, apparatus or machines, and improve, sell and otherwise dispose of the property of the company. Its capital was fixed at \$1,000,000, divided into 10,000 shares of \$100 each, representing improvements in submarine vessels and apparatus, for which a caveat had been filed under the United States patent laws, preparatory to obtain-

ing a patent. The company owned the invention and the right to letters patent for the same.

The majority of the stock was owned by the plaintiff, who was secretary and treasurer of the corporation, and by S. B. Clark, who was its president. The plaintiff applied for, and procured patents for the invention in this and other countries, for which he paid out large sums of money, which constituted the cause of action for which he claimed to recover; the issue in the action was referred to a referee, who reported in favor of the defendant. Judgment was entered upon the report and the plaintiff appealed from the same.

Henry E. Davies, Jr., for the appellant.

Fithian & Clark, for the respondent.

DANIELS, J.:

The evidence given by the plaintiff, as a witness upon the trial, tended to prove that he took proceedings to obtain patents for the invention assigned to the defendants, and paid out the sum of money requisite to carry them on and render them effectual, with the concurrence and approbation, and by the request, of the president and other trustees of the corporation, and that the patents, when procured in that manner by him, had been transferred and delivered to the corporation and were afterward held by it as its property. This was sufficient to create a *prima facie* right to recover on his part; but his statement upon these matters was controverted by the evidence given by Clark, who was president of the corporation. From that, it appeared that the proceedings to procure the patents were taken under the joint concurrence of the plaintiff and himself, in order to improve the stock owned by them in the corporation; and that they both acted for themselves and not on behalf of the corporation. He further testified that the patents had not been transferred or delivered to the corporation, and that it had received no benefit from the plaintiff's expenditures. The state of the accounts and the character of the correspondence proved, tended to confirm this view of the plaintiff's employment. As a whole, the evidence was quite evenly balanced, except as to the receipt of the patents

by the company; upon that, the preponderance was against the plaintiff, because his knowledge upon that subject seemed to be dependent upon the information communicated to him by Sanborn, his successor.

This state of the evidence rendered the inquiries, whether the employment was by the company or for its benefit, or whether it had received the fruits of the plaintiff's services and expenditures, matters of fact for the determination and decision of the referee, and he has determined them in favor of defendant. This conclusion is final in the case, because nothing appears from which it can reasonably be held to be improper. The minutes of a meeting of the trustees, held on the 9th of June, 1866, contained the statement that the plaintiff's action, in procuring the patents was approved; if that had been true, a good reason would have existed for sustaining his claim for reimbursements, but the defendant's proof directly tended to show that such action had not been approved, and that the entry in the minutes was made by the plaintiff without authority. That theory of the fact seems to have been adopted as the truth by the referee, and the entry itself was not permitted to continue in the minutes, for it was afterward expunged by a vote of the trustees, at what seems to have been a regular meeting of the board. There was nothing, after that, in the evidence showing any action on the part of the corporation relating to the plaintiff's services or expenditures.

The evidence, tending to show that the entry in the minutes of the meeting of the trustees, that the action of the plaintiff was approved, was untrue, and inserted there by the act of the plaintiff himself without authority, was entirely pertinent and proper. He produced the entry as evidence that the company had approved of his action, and, therefore, had become liable to refund the money disbursed by him in the course of its business; and the company, certainly, had the right to avoid the inference by showing that no such approval was made, and the entry, stating that it was, an untruth inserted in the minutes by the unauthorized conduct of the plaintiff. In the early progress of the trial, the plaintiff, pursuant to a notice, required the defendant to produce its certificate of incorporation, the assignment of the invention to Smith, one of the company's trustees, and the minutes of the meeting of the board of trustees. The books and papers were not produced, and

the plaintiff then produced proof of the certificate of incorporation and contents of the assignment. He also proved the contents of the minutes so far as to show the entry of the proceedings of the trustees' meeting on the ninth of June, containing his statement that this action was approved, but he did not give proof of the entry of the proceedings of the meeting of the seventh of November, at which the statement of that approval was expunged. After the plaintiff rested, the defendant produced and read the certificate of incorporation, the assignment of the invention and its improvements to Smith, and the record of the meeting of the trustees, held on the seventh of November. This proof was received after the plaintiff had objected to it upon the ground that the defendant should not be allowed to make it after having failed to produce the papers and the book, when required to do so, according to the terms of the plaintiff's notice, and the plaintiff excepted to the ruling allowing it to be given. The objection taken to proof of the certificate of incorporation could not, in any view, be maintained, because the certificate was filed in the office of the clerk of the county, and had thereby become a public record, and accessible to one party, as it was to the other; and that taken to the production and proof of the book of minutes, is equally without foundation, because its object was to prove the record of the meeting of the seventh of November, concerning which the plaintiff gave no evidence, and that was all the evidence given by the defendant from the book. Under the objection taken by the plaintiff, it would extend the rule, relied upon by the plaintiff, altogether too far, to hold that a party, required to produce a book upon the trial for the benefit of the other party, so as to enable him to prove and read one portion of it, should, on account of his failure to do so, be precluded from proving and reading an entirely different portion of its contents, and that was what the plaintiff insisted upon by means of his objections. What the plaintiff required, was to prove the portion of the entry showing the statement of the approval of his action in obtaining the patents; and the use made of the book by the defendant, under the objection, was to show that the statement concerning it had afterward been expunged, at what appears to have been a regular meeting of the board of trustees.

There can be no doubt but that the rule of evidence, relied upon by the plaintiff, respecting the effects of omitting to produce the books and papers upon the trial, when required to do so by the notice of the opposite party, is well settled, and besides that, it is just and wholesome, and, in all proper cases, should be observed and applied. The party failing, after notice, to produce, books and papers in his possession or under his control, is not entitled to the favorable consideration of the tribunal before which the trial may be proceeding as to that part of his cause of action or defense which may be dependent upon their contents; and no injustice is done to him, after he has voluntarily withheld them when they were required by his adversary, by excluding them from the case upon his offer to introduce them. It is but a just consequence of his own misconduct for the needless embarrassment occasioned to his adversary. And the rule of evidence existing on that subject should be enforced against the defaulting party.*

Under this rule, the assignment ought to have been rejected by the referee. But the judgment cannot be reversed because he erred in that respect; for the proof, made by means of them, was more beneficial and important to the plaintiff than it was to the defendant. In fact it does not seem to have been of the least consequence to the defendant's defense. And it was a circumstance in the plaintiff's favor, because it showed that the title, received by the company for the invention and improvements from Smith, was complete. Although an error on the part of the referee in allowing the papers to be read, under the circumstances, it was one which in no way produced any possible injury to the plaintiff. For that reason, it cannot be allowed to invalidate the judgment afterwards directed by him.

There was no error in allowing the defendant's witness, Clark, to contradict what the plaintiff had been previously permitted to state, concerning his employment by the officers and stockholders, to procure the patents for the invention, nor in allowing him to testify from memory who the stockholders of the company were, as long as his personal knowledge enabled him to do that.

The case shows that there was evidence from which the referee

* *Doe v. Cockell*, 6 Car. & P., 525; *Lewis v. Hartley*, 7 id., 405; *Collins v. Gashon*, 2 Foster & Finlason, 47; 2 Phillips' Evidence, 5th Am. ed., 447.

could reasonably find that Clark supplied part of the money expended in procuring the patents, and for that reason he was warranted in finding the fact as he ultimately did, although he had previously stated generally that the expenditure was made by the plaintiff. These findings are not inconsistent, because, by the last one, no attempt was made to change the amount previously stated to have been expended by the plaintiff. The effect is that Clark was found to have advanced money as well as the plaintiff.

If the referee had adopted the plaintiff's own evidence as the truth, no difference in the result would have been produced by it. For he testified that when he was applied to by the officers of the corporation to advance the money for the patents, the promise made was that he should be repaid by the company for the money advanced, as soon as any money was received into its treasury. And he afterwards stated that "there never was any money in the treasury of the company." This, at the best, was but a conditional promise, and by the plaintiff's own evidence it appeared that the condition, on which it was rendered dependent, had never been performed. If these facts had been found as he stated them, they would not have entitled him to judgment. But they were not, for the defendant's witness, Clark, stated that no such promise even as that was made, and the referee adopted that as the truth in the case.

All the evidence which the defendant gave was admissible under its answer, for it simply went to show that the theory on which the plaintiff claimed to recover was not true in point of fact.

The referee's omission to find the facts he was requested to by the plaintiff's counsel can be of no service to him upon this appeal. For if he was wrong in declining, the remedy for its correction is not by way of appeal from the judgment.*

No ground exists on which the appeal taken can be sustained. The judgment should therefore be affirmed, with costs.

DAVIS, P. J., and WESTBROOK, J., concurred.

Judgment affirmed, with costs.

* Rogers v. Wheeler, 53 N. Y., 262.

GEORGE A. OSGOOD AND CYRUS CURTISS, AS RECEIVERS
OF THE COLUMBIAN INS. CO., PLAINTIFFS, v. WM. S. TOOLE
AND BENJAMIN D. LEFEVRE, DEFENDANTS.

Premium notes — assets, when exhausted — how proved — renewal of void note — principal and surety.

Action by plaintiffs, as receivers of Columbian Insurance Company, upon two promissory notes given by defendants to the company as "security notes." The charter provided, in respect to such notes, that, "as between the makers and the company, they shall be liable merely to the extent of the premiums written upon them, and for loans and liabilities of the company after the cash capital and other resources of the company shall have been first *exhausted*." *Held*, that the word *exhausted*, as used in the charter, does not mean actually applied toward the extinguishment of liabilities; that the cash capital and other resources may properly be said to be *exhausted*, when the losses, which they are held to meet, are concededly greater than their amount.

At the trial, the testimony of the book-keeper and secretary of the company, and also of the cashier, who was clerk of the receivers, as to the condition of the affairs of the company at the time of the appointment of the receivers, was admitted. *Held*, that this was proper; that the witnesses possessed the requisite knowledge, and that the adjustment of liabilities by the receivers, who are officers of the court, is *prima facie* evidence in suits brought to recover upon premium or security notes.

Each of the notes was payable seven months after its date. *Held*, that the fact that one of them was given in renewal of a note which was, in violation of the charter, made payable twelve months after date, furnished no defense to it.

The makers of such a note and the company did not stand to each other in the relation of principal and sureties.

THIS case having been tried before a jury, and a verdict having been rendered in favor of the plaintiffs, the court directed the exceptions to be heard in the first instance at the General Term. At the time the notes in suit were given, the makers of such notes were, by the charter of the company, entitled to a dividend from the profits of the company, if enough remained after paying certain dividends to the stockholders. The dividend was to be paid in scrip, and the certificates declared the person receiving them to be entitled to a certain portion of the invested funds of the company, and to an annual interest thereon not to exceed six per cent, and contained a proviso that the amount named therein was liable for

any future loss of the company. After the notes in suit were made, the company passed a resolution altering the tariff and agreeing, in future, to "return in cash, at the end of each fiscal year, fifteen per cent of all premiums paid and earned during the year in lieu of scrip, at the option of the dealer, such option to be signified at the time of application." The defendants claimed that the relation existing between the company and themselves was that of principal and sureties, and that by this change in the mode of conducting the business they were discharged.

The other facts appear in the opinion.

A. R. Dyett, for the defendants.

D. D. Field, for the plaintiffs.

DAVIS, P. J.:

This case comes here upon exceptions ordered to be heard in the first instance at General Term.

The plaintiffs are receivers, duly appointed, of the assets and property of the Columbian Insurance Company. The action is brought upon two promissory notes, one of which is dated the 11th day of December, 1861, for \$840, payable to the order of the Columbian Insurance Company seven months after date; the other, dated the 11th of July, 1861, for \$930, payable to the order of the said company seven months after date.

The plaintiffs claimed, and the jury, under the charge of the court, have found, that the notes were given as security notes in advance of premiums, with intent that they should be held and owned by the company, under the provisions of its charter. The charter provided, in respect of such notes, that "they shall be drawn to the order of the company, and made payable within twelve months from date; as to third parties, they shall be deemed the absolute property of the company, and may be used for the payment of losses and liabilities, and for any other purpose connected with the business of the company; and, when negotiated and in the hands of such third parties, shall not be subject to any equitable claim or offset as between the makers and the company; whether existing at the time of their negotiation or accruing after

wards; as between the makers and the company they shall be liable merely to the extent of the premiums written upon them, and for losses and liabilities of the company after the cash capital and other resources of the company shall have been first exhausted."

The first exception arises upon the ruling of the judge at circuit, allowing the testimony of the book-keeper and secretary of the company, and also of the cashier of the company, who was clerk of the receivers, as to the condition of the affairs of the company at the time of the appointment of the receivers. The objections were, that the evidence was incompetent, that the witness was not shown to have such knowledge upon the subject as would authorize him to state, and that an adjustment and admission of liabilities by the receivers were not evidence of their existence as against the defendants. Neither of these objections was well taken. It was clearly competent to show the extent of liabilities and the amount of assets, as bearing upon the question of the exhaustion of cash capital and resources under the charter. The witnesses were possessed of the requisite knowledge to answer the questions put to them respectively, and they answered to facts within their knowledge; and lastly, the adjustment of liabilities by the receivers, who are officers of the court, is *prima facie* evidence of the existence of such liabilities, when suits are brought to recover upon premium or security notes. The objection was not pointed to the non-production of the papers showing the official adjustment by the receivers. These witnesses showed that the adjusted liabilities of the company were about \$2,700,000, and the unadjusted about \$500,000 or \$600,000; that the assets were between \$400,000 and \$500,000, exclusive of what were called the Alabama claims, which are stated at about \$700,000, the latter being as yet unsettled; these facts showed that it was not possible for the assets of the company to pay a dividend to creditors beyond thirty or forty per cent, even if the Alabama claims should be recovered in full. Upon this state of facts the learned judge charged the jury, "that if the cash capital and other resources were substantially exhausted, and it is apparent that there is not the slightest shadow of doubt that the assets of the company are not sufficient to meet the amount of the losses, that then the representatives of the company would have the right to call upon the makers of these security notes to respond." To this

part of the charge there was an exception. We think the charge was quite as favorable to defendants as they were entitled to. The word *exhausted*, as used in the charter, does not mean actually applied toward the extinguishment of liabilities. The cash capital and other resources may properly be said to be exhausted when the losses, which they are held to meet, are concededly greater than their amount. It was in that sense the word was used. The construction claimed by the defendants would require that every asset should be first reduced to money and then paid out in full before the security notes could be enforced, and the result would be, in this case, that the creditors would be postponed till the end of the seemingly interminable contest in congress, whether the money recovered from Great Britain, under the treaty, shall be equitably applied to the claims of insurance companies like those in the hands of plaintiffs, or arbitrarily confiscated by the *brutum fulmen* of the government. The defendants also insist that the notes in suit were void because given in renewal of notes payable "twelve months after date." instead of "within twelve months." It was held in *Osgood v. Toplitz* * that this departure, in form, from the language of the charter, was fatal to the validity of the security notes. We are not driven to show that that decision was unsound because this case is not within its facts. The notes in suit are payable at seven months after date, and therefore *within twelve months*; and the fact that one of them was given in renewal of a note which was payable twelve months after date, is not material, because it would be the duty of the court, for the protection of the creditors of the company, to hold that the new note was given to cure the inadvertent error of the first one. A note given in place or renewal of one absolutely void by statute, which excludes the vice that destroyed the former, may be enforced. †

There was no such relation, in our judgment, of principal and surety between the company and the defendants as vitiated the obligations of the latter by the changes made by the company in the mode of doing its business, under the resolution of August, 1861. It was no change in the contract of defendants, nor did it

* 3 Lansing, 184.

† Hammond v. Hopping, 13 Wend., 505; Goulding v. Davidson, 26 N. Y., 808; Brackett v. Barney, 28 id., 338.

operate to effect one; and although this note was security for creditors in certain events, yet it was not in the nature of the obligation of surety, whose rights are *strictissimi juris*, and who, upon any change of the terms of his liability, without his own consent, may always say, "*non habo fœdera veni*." To apply that rule to notes given as premium or security notes, under the charters of the insurance companies, would inject a virus, fatal to all protection for their creditors.

We think the plaintiffs are entitled to judgment upon the verdict.

DANIELS and WESTBROOK, JJ., concurred.

Judgment for plaintiffs.

STEPHEN KROM, SURVIVOR, ETC., RESPONDENT, v. JOHN J. LEVY, APPELLANT.

Memoranda—when admissible as evidence—defective performance—defense of.

Entries in a book, which the witness swears he knew to be correct when made, that he saw most of the entries when made or very soon after, and that the book produced was the original, are properly admitted in evidence. When the witness testifies, of his own knowledge, of the accuracy of the prices charged, and that work was done and materials were furnished between certain times, but that he could not give the dates when each item was done or furnished without looking at the book,—*held*, that it was proper to read from the book the dates and amounts which could not otherwise be given.

A party may retain, without compensation, the benefits of a partial performance only when, from the nature of the contract, he must receive such benefits in advance of a full performance, and when, by its terms or just construction, he is under no legal obligation to pay until the performance is complete; otherwise the party receiving the benefit of insufficient performance must find his relief in damages.

APPEAL from a judgment in the Supreme Court, in favor of the plaintiffs, entered on the report of a referee.

This action was brought to recover a balance of account for work done and materials furnished by the plaintiff and John A.

Schenck, as partners, for the defendant. The referee reported sixty-three dollars and twenty-three cents, together with interest on the same from the 8th day of June, 1864, to be due to the surviving plaintiff. From the judgment entered upon the report the defendant appealed.

N. B. Howie, for the appellant.

Coles Morris, for the respondent.

DANIELS, J.:

The plaintiff's demand was proven in part by his own evidence accompanying the book of account kept by his deceased copartner.

He was asked what he knew about the entries in the book, and the defendant objected to the inquiry as irrelevant and incompetent, because it appeared that his copartner kept the book exclusively, and the knowledge of the witness must necessarily be secondary evidence, and he should be confined to his knowledge of work done for the defendant.

These objections were very properly overruled, because the question simply required the witness to state what knowledge he had concerning the entries; and his answer clearly showed the propriety of the inquiry, for he merely said that at the time they were made he knew them to be correct. The exception taken to this ruling of the referee has no colorable support to sustain it.

Upon his cross-examination, this witness stated that he kept all the memoranda from which the entries were transcribed. That they were usually made on a slate kept for that purpose, and transcribed from that into the book by Mr. Schenck, sometimes every day and sometimes at intervals of two or three days, and that he generally assisted, reading them from the slate. The items themselves, he stated, were taken orally from the workmen and some from himself. These memoranda were of work done by himself and the other workmen, and all the work they and he did.

He stated farther, that he saw most of the entries at the time they were made, or very soon after, and that he believed the book produced to be the original. It also appeared that the firm did

work for the defendant. This evidence was sufficient to allow the book to be received as evidence in the case.*

After it was given, and before the book was received, the witness stated that he could relate, of his own knowledge, what the first work was, which was done by the plaintiff for the defendant. And as he was about to read from the book, the defendant objected that the entries in the book were not evidence, for the reason that Schenck was the proper person to prove them, and that the evidence of the witness, reading from the book, was secondary and incompetent.

These objections were overruled and the defendant excepted. The witness was then about proceeding with the reading of the entries, when it was agreed he could use the bill of particulars instead of the book, and he did so. But, before reading from it, he stated that he could testify, of his own knowledge, of the accuracy of every item in the bill as to prices, and knew they were reasonable; and added, further, that the work and material, mentioned in the bill, was done and furnished by plaintiff for the defendant, all between May 10th and October 26th, 1862. But he could not give the dates without looking at the book, and he then read from the bill of particulars.

As the items were authenticated by the evidence which the witness gave, there was no impropriety in allowing him to read them, for the purpose of supplying the dates and amounts which could not be otherwise given.†

In the case of *Russell v. Hudson River R. R. Co.*,‡ it was held that a memorandum might be so used by a witness, when it appeared to have been made on or about the time of the transaction to which it relates; that its accuracy is duly certified by the oath of the witness; and that there is necessity for its introduction, on account of the inability of the witness to recollect the facts. § Within these authorities, it was entirely proper to allow the witness to read from the bill, as that was substituted by consent for the book, for

* *Sickles v. Mather*, 20 Wend., 72, 75, 77; *Merrill v. Ithaca and Oswego R. R. Co.*, 16 Wend., 588.

† 1 Greenleaf on Evidence, § 498.

‡ 17 N. Y., 184.

§ *Id.*, 140.

of defense, or reserve it for an independent action in his own behalf.*

By omitting to allege it in his answer, he must be presumed to have elected not to rely upon it as a defense to the claim made by the plaintiff for the work done upon the card-cutters. As this defense was not involved in the action, it is unnecessary to examine the defendant's exception to the evidence given, showing that the defendant made no claim that the work done or materials furnished for the card-cutters, were in any respect defective.

At the same time no reason exists for doubting its propriety, since it would have a slight tendency, certainly, to show that both had proved satisfactory.

The breach of the contract made by the plaintiff and his partner, for planing and cutting the back form, was set forth in the answer.

And the defendant was allowed \$125 by way of damages for its non-performance. It was claimed that a farther allowance should have been made for the difference in the value of the form and the price for which it would sell as old metal. This claim was made upon the ground that it had been rendered useless by the work performed upon it. The only evidence, supporting that position, was that which the defendant himself gave as a witness, while that of Hookey and Tucker, who were produced as witnesses in his behalf, failed to sustain him in this respect.

They described it as a casting on which work had been done, but not in such a manner as to injure it. The evidence they gave fully justified the referee in his conclusion upon this subject.

But one of these witnesses, who seems to have been fully competent to form an accurate judgment as to the expense of performing the agreement made, testified that it would cost \$150 to do the work upon it which the plaintiff and his partner undertook to perform; and that ten or fifteen dollars' worth of the work only had been done upon it.

That does not appear to have been allowed to the plaintiff, and cannot be said to be included in the bill of particulars. The defendant has consequently derived that amount of benefit from the partial performance shown, without cost or expense upon

* Gillespie v. Torrance, 25 N. Y., 306, 309, 311.

his part; to complete the work contracted for, required an expenditure of \$135 or \$140. And that included the contract price of fifteen dollars, which the defendant agreed to pay the plaintiff and his partner for it.

As that was not paid by the defendant, but would have been, if the contract had been performed by them, it should be deducted from the damages arising out of their failure to perform.

And that deduction will reduce the damages to the amount allowed by the referee.

It placed the defendant precisely where he would have been if that agreement had been performed as it should have been.

No reason can be found for doubting the legality of the conclusions stated by the referee.

The judgment, therefore, should be affirmed, with costs.

DAVIS, P. J., and WESTBROOK, J. concurred.

Judgment affirmed.

RODMAN M. PRICE, PLAINTIFF, v. ERASMUS D. KEYES
AND EDMUND SCOTT, IMPEADED WITH THEODORE
PAYNE AND SQUIRE P. DENY, DEFENDANTS.

Exceptions—how heard—agent, when liable for sale of principal's property—damages—how determined.

Where exceptions are taken at the trial, the Code has provided three different modes of reviewing them: by an appeal from the judgment; by a motion for a new trial upon them at the General Term, when the judge before whom the cause was tried directs that they be heard in the first instance at the General Term; and by a motion for a new trial at the Circuit or Special Term.

The Special Term cannot hear a motion for a new trial, while an order, directing the exceptions to be heard in the first instance at the General Term, continues in force.

In an action brought to recover damages for the wrongful sale and conversion of a large amount of real estate, owned by the plaintiff and sold by the present defendants as his agents, *held*, that the defendants were not liable for any error of judgment on their part, or for injudiciously making the sale in order to avoid the effect of an attachment law taking effect the next day, under which the plaintiff's non-resident creditors could attach and seize his property, but that

they could only be held liable for designedly selling his property for their own benefit or for the purpose of depriving him of the benefit of it.

The defendants being jointly charged with a fraudulent sale of plaintiff's property, the court decided that all evidence, competent for any purpose, against either defendant, should be received and afterward distinguished and applied as the case should require. *Held*, that this was a proper rule to adopt.

To constitute a ratification by means of acquiescence or the omission to make the unauthorized act of the agent the subject of objection, the principal must have information giving him notice of what may have been done to his prejudice, and, without such information there can be no ratification where the principal received nothing from the transaction and no part of the proceeds have been applied, with his assent, to his benefit.

Where a person tortiously disposes of another's property, he cannot discharge himself from the consequences of his act by applying the proceeds in payment of its owner's debts, without his authority or assent.

The property was sold by the defendants on the 30th of June, 1863, and the court allowed the jury to regulate the amount of their verdict according to the value of the property during the residue of the year. *Held*, that this was proper. The owner should be allowed the fair value of the property, wrongfully taken from him, to be ascertained according to its market price, within a reasonable period after the commission of the wrong; and where it consists of a number of parcels, amounting in value to a large sum, a period of six months is not unreasonable.

THIS case was tried before a jury, at the New York circuit, on the 23d of May, 1864, and a verdict rendered against the defendants for \$129,699.15.

Exceptions having been taken to questions of law arising during the progress of the trial, the court directed the exceptions to be heard in the first instance at the General Term, and that in the meantime the judgment be suspended. The facts are stated in the opinion.

Fullerton, Knox & Crosby, for defendant Scott, insisted that the court erred in leaving to the jury the question whether or not Price's instructions to Keyes to sell in parcels ever came to Scott's knowledge. (*Harris v. Wilson*, 1 Wend., 511; *Small v. Smith*, 1 Denio, 586; *Storey v. Brennan*, 15 N. Y., 526.)

John Chetwood, for defendant Keyes, insisted that the four years' silence of Price, after being advised of the sale, was a conclusive answer to the action. (Dunlap's Paley on Agency, 3d Am. from 3d Lon. ed., p. 31, side paging; Story on Agency, §§ 255, 258; *Cairnes v. Bleecker*, 12 Johns., 300; *Berwick v. Dusenberry*, 32 How. Pr.,

348; *Bridenbecker v. Lowell*, 32 Barb., 19; *Prince v. Clark*, 1 B. & Cress., 186; *Smith v. Cologan*, 2 T. R., 188, in note.) That the rule of damages laid down by the court was wrong. (*Suydam v. Jenkins*, 3 Sandf., 614; *Jegon v. Vivian*, L. R. [6 Ch. Ap.], 760, *Bartholomew v. Jackson*, 20 Johns., 28.) The charge that if the plaintiff had acquiesced in the payment of his debts, a deduction should be made to that amount from the damages otherwise recoverable, was erroneous; such an acquiescence would have ratified the whole transaction, including the sale itself. (*Benedict v. Smith*, 10 Paige, 130; *Wilson v. Poulter*, Strange, 859; Story on Agency, §§ 239, 250; *Moss v. Rossie Co.*, 5 Hill, 143; *Bristow v. Whitmore*, 9 Clark's House of Lords Cases, 404, 408, 413; *Gresley v. Mousley*, 3 De G., Fisher and Jones, 445, 446; *Clark v. Perier*, Freeman's Chy., 48; S. C., 2 Eq. C. Abr., 707.)

Ashbel Green and *J. S. L. Cummings*, for plaintiff, insisted that the Special Term had no power to entertain the motion for a new trial. (*Hoxie v. Greene*, 37 How., 97; *Cronk v. Canfield*, 31 Barb., 171; *Dickinson v. Wason*, 48 Barb., 413; *Purchase v. Matteson*, 25 N. Y., 211; *Taylor v. Harlow*, 11 How., 285; *Morange v. Morris*, 20 How., 257; *Hotchkiss v. Hodge*, 38 Barb., 119.)

DANIELS, J.:

When the trial of this cause was completed at the circuit, the learned justice who presided ordered the exceptions, taken by the defendants, to be first heard at the General Term, and judgment to be in the meantime suspended. The order in this respect was strictly in conformity with the provision made by section 265 of the Code of Procedure, and it was probably made, as such orders usually are, as a matter of practice, at the instance or solicitation, and to promote what may at the time have been considered the convenience, of the defendant. It is not important for the disposition of the case whether that was the fact or not, because the consequences of the order would be the same, even if it had been made at the instance of the learned justice himself; but such orders are not usually made in that way, particularly where the defeated party manifests any disposition to withhold his assent. No such

dissent appears to have been indicated in the present case, and it is to be presumed that none existed.

By the order made, the case was, in effect, sent to the General Term for two purposes. First, to enable the defendants to move for a new trial upon their exceptions; and secondly, for judgment to be pronounced there in case the motion should prove unsuccessful. Where exceptions are taken, the Code has provided for three different modes of reviewing them: it may be done by an appeal from the judgment, by a motion for a new trial upon them at the General Term, under such an order as was made in this case, and by a motion for a new trial at the circuit or Special Term. In the latter instance, an application may also at the same time be made for a new trial, because of the misdirection of the court, or for the reason that the verdict has been rendered either without evidence or against the evidence appearing in the case.* This court has always possessed that power, and there is nothing in the Code by which it has either been abrogated or abridged. A different view of the law was suggested by the judge who delivered the opinion in *Parker v. Jervis*,† but it was not necessary for the decision of the case, and probably was not concurred in by the other members of the court.‡ Several years after the order was made, directing the exceptions in this cause to be first heard at the General Term, such an application was made to the Special Term by the present defendants; it was opposed because of that direction, but the objection was overruled by the court, and the application was formally heard and denied. Both parties have appealed from the order which was then made, the plaintiff claiming that the application should not have been heard at all, on account of the direction which was given to the case at the circuit, and the defendants insisting that the verdict should have been set aside and a new trial ordered.

While the unqualified power to hear a motion for a new trial after verdict, has been given to the Special Term, its exercise has not been reserved in a case where a previous direction has been made that the motion shall be heard on the exceptions, in the first instance, at the General Term. Such an order, as well as the pro-

* Code, § 265; *Macy v. Wheeler*, 30 N. Y., 231.

† 3 Keyes, 271.

‡ *Smith v. Aetna Ins. Co.*, 49 N. Y., 211, 216.

vision of the law allowing it to be made, contemplates a different course of proceeding after it has been made, and that is, that the motion must be first heard at the General Term and the judgment on the case be there pronounced. The provision of the Code, contained in the section already referred to, is mandatory on this subject. And yet, if the Special Term can entertain and dispose of a motion for a new trial while an order continues in force, sending the exceptions in the first instance to the General Term, the force and effect of that provision can be at once defeated. For, if the verdict can be set aside by the Special Term, the exceptions cannot be heard at the General Term, and judgment cannot be given there, if the case proves to be in such a condition as to require that disposition to be made of it. In that way, the practice devised by the Code for one purpose, could be made the means of nullifying its provision for another. That could not have been the design of any part of the system created by it. By giving the court the power to send the case on the exceptions, in the first instance, to the General Term, it must have been intended, when such a direction should be given, that the entire case, so far as it might involve a review of the trial, would be there considered and disposed of. This necessarily follows from the nature of the direction given, and the disposition to be made upon the hearing of the case, unless a new trial be ordered; then judgment must be ordered upon the verdict. This operates as a restriction on the general power conferred upon the Special Term to hear and determine motions for new trial. That allows that practice to be pursued except when such an order has been made as was directed in this case, and then the implication is clear that the case must be heard and disposed of by the General Term.* The Special Term, therefore, should have dismissed the application made to it for a new trial, instead of hearing and denying it.†

The only remedy available to the defeated party, where an order has been made, sending the case, in the first instance, to the General Term, while that direction remains undisposed of, is to bring on the motion for a new trial before that court. And that, from the nature and terms of the direction, must be heard only upon the

* *Beattie v. Niagara Savings Bank*, 41 How., 187.

† *Devos v. Hackley*, 3 Robertson, 679; *Morange v. Morris*, 20 How., 257, 263.

exceptions taken during the trial. The right to move in the first instance at the General Term is reserved exclusively to a class of cases dependent solely upon the law. For it is only legal points which can be raised and presented by exceptions; and it is the exceptions, and nothing beyond them, which the court is permitted to order to be first heard at the General Term. They are the subjects which that court is required to hear, and upon their being found to be well taken a new trial must be directed, while if they are unsustained the court must pronounce judgment in favor of the successful party.* Exceptions can be taken only to rulings made by the court during the progress of the trial. They cannot be presented to the conclusions of the jury, and do not bring up the point for consideration, whether or not the verdict has been rendered either without or against the evidence. Upon the hearing of the exceptions, in the first instance, by the General Term, that point cannot be brought before the court.†

The action was brought to recover damages arising out of the wrongful sale and conveyance of a large amount of real estate, owned by the plaintiff, and disposed of by the present defendants, as his agents. The property sold and conveyed, consisted of nineteen different lots or parcels of land, and an undivided half of two other parcels of land. It was incumbered by mortgages upon a portion of it, and by judgments which were liens upon all of it, to an amount exceeding the sum of \$100,000, and it was sold, in one mass, for the nominal sum of \$135,000, but in reality for the sum of \$140,000, the additional \$5,000 being added for the payment of commissions. The sale was made by the co-operation of both the present defendants, and the title conveyed by the defendant, Scott, under a power of attorney given by the plaintiff to him on the 3d of December, 1852, empowering him to sell any real estate owned by the plaintiff in the State of California. In the submission of the case to the jury, the court instructed them that the defendants could not be held liable for any error of judgment on their part or the part of either of them, or for injudiciously making the sale in

* Code, § 265.

† *Hoxie v. Green*, 87 How., 97; *Cronk v. Canfield*, 81 Barb., 171; *Hotchkiss v. Hodge*, 88 id., 117; *Dickerson v. Wason*, 48 id., 412; *Sheaf v. Utica & Black R. Co.*, 2 N. Y. Supreme Court Reports, 388.

order to avoid the effect of an attachment law taking effect the next day, under which the plaintiff's non-resident creditors could attach and seize his property for the non-payment of their debts but that they could only be held liable for designedly selling his property for their own benefit, or for the purpose of depriving him of its benefit. This, though not in the terms, was the substance of the charge, so far as it presented the mere point of liability.

When the plaintiff rested his case, each of the defendants moved for a dismissal of the complaint. The motion was denied and the defendants severally excepted. No reason was specified for which a dismissal was claimed to be proper. But, without any doubt, the point should be regarded as taken, that the evidence was not sufficient to warrant a recovery upon the theory alone on which the action was rendered dependent; and that was whether these defendants had sold and conveyed the plaintiff's property for the fraudulent purpose of despoiling him of it, and for the promotion of their own personal interests as distinguished from his. To that extent, the exception taken requires the consideration of the effect of the evidence then before the court, but no farther. For whether the ruling was proper or not as to the other defendant, who was one of the two joint purchasers of the property, it is not necessary to inquire, as the verdict of the jury was in his favor.

Before the power of attorney was given to the defendant, Scott, and in the month of September, 1851, another was given by the plaintiff to the other defendant, Keyes. This was not quite as extended in its authority as the one delivered to Scott, for the power it gave to sell was confined to any part or parcel of the plaintiff's real estate situated in the State of California. The contract for the sale was made and executed on the last day of June, in the year 1853. During the early part of the preceding month, and for some time before that, the defendant, Keyes, was in and about the city of New York, and represented to the plaintiff that his creditors were generally well disposed toward him; substantially, that he had nothing to apprehend from them so far as this property was concerned, and that his prospects in its management and final sale were promising. Before this defendant left the city of New York, on his return to San Francisco, and by a letter written and sent during his passage, he solicited from the plaintiff a power of

attorney more complete in its authority than the one he then had. Such a power was afterward executed and sent by mail to this defendant, but it was not received by him until after the contract for the sale of the plaintiff's property had been made. And there is reason for believing that the contract was made by the defendant Scott, instead of the defendant Keyes, with whom the plaintiff's relations seem to have been more intimate and confidential, for the reason that his power of attorney was broad enough to sanction a sale of the property in one mass, while that to Keyes would not do that. By the contract made for the sale of the property, its entire price was appropriated to the payment and extinguishment of the incumbrances upon it, except the sum of \$10,000, for the obligation to pay the other \$5,000 was not inserted in it, and that difference, after being received by Scott, was paid to Keyes as commissions and afterward divided between them both. In afterward accounting for the sale and the disposition of the \$10,000 received from its proceeds, that was simply shown as having been received by Scott and then paid over to Keyes, without any explanation or allusion whatever to the other \$5,000. But three debts, not liens upon the property at the time of the sale, are mentioned by Scott in a letter, not in the case, but referred to by the justice in his charge, and probably accompanying the account, as having been compromised by Keyes for \$5,000, paid by himself apart from any money due on the sale; while Keyes, in his letter of the thirty-first of July, stated that he understood these debts had been settled, but did not know how it had been done. These inconsistencies in their statements were calculated to throw very grave suspicions over the defendants' conduct in making the sale, and suggest the probability that they had been guilty of some undisclosed misconduct. And when added to the representations which Keyes made before he left for California, his solicitude for a broader power of attorney, and the circumstance that the plaintiff was not and could not be possibly benefited by the sale, and that the two agents concurred in making it, and dividing the only money derived from it between them, it would seem to be entirely sufficient for the consideration and action of the jury, upon the inquiry whether the defendants were not guilty of the misconduct with which they were charged by the plaintiff. There was nothing, therefore, in the exceptions

taken to the refusal to nonsuit, and they must accordingly be overruled.

The witness, Van Nostrand, was allowed to state what was the value of this property in 1849, against the objection of the defendants that it was irrelevant. This followed the statement made by the same witness, that an offer of \$300,000 was then made for the property, and Keyes disapproved of selling for that amount. The answer was, that the property was then worth that amount. And it was not irrelevant, because the condition and value of the property was generally traced down to the time of the sale, and evidence was given as to the extent to which it was improved by the plaintiff in the meantime. This evidence, though remote, had some bearing upon the inquiry as to the value of the property when the sale was made, particularly as it was situated in a thriving, prosperous city where property was inclined to advance rather than recede in value.

The court did not hold that the evidence, admitted against the other defendants, was admissible against the defendant, Scott. But the ruling was, that all letters and conversations prior to the sale were competent evidence, without specifying as to whom it should apply; and that, when competent for any purpose, it should be received, but whether it should finally be considered as testimony proper to be submitted against all the defendants, would depend upon what had or should transpire before the evidence closed. There could be no impropriety in this course, as the defendants were jointly charged with a fraudulent sale of the plaintiff's property. It was not held that evidence, not admissible against either defendant, could be received; but that, so far as the evidence was proper against either, it should be received and afterward properly distinguished and applied by the court, as the case proved should require that to be done. Neither defendant could be injured by that course in the end, and it was the most convenient that, under the circumstances, the court could adopt.

Other exceptions were taken to the ruling of the court on the subject of receiving and rejecting evidence. But they are not relied upon in support of the present motion, and if they were, no reason appears for doubting the correctness of the decisions by which they were disposed of by the court.

Evidence was given during the progress of the trial from which the plaintiff claimed that the fact was established that he requested the defendant, Keyes, to have his property sold in parcels and not as one mass. The defendant, Scott, requested the court to instruct the jury that there was no evidence that this instruction ever came to his knowledge. That the court declined to do, leaving the question to the jury. And the defendant, Scott, excepted to that disposition of the point. As the case is now presented to the court, there is no direct evidence contained in it that this instruction was communicated to the defendant, Scott, before the sale was made. But this court cannot say there was no such evidence, because the case contains no statement that all the evidence was inserted in it;* while the charge of the court shows that an important letter, received from Scott soon after the sale, and containing some reference to it, was used as evidence on the trial, which the case does not contain. Even this letter may have contained something from which it might be inferred that Keyes did communicate to Scott the instructions received by him from the plaintiff. It did appear, during the trial, that the relations existing between these two defendants were probably friendly and confidential, and that they certainly were engaged in the common enterprise of disposing of the plaintiff's property, not for his, but rather for their own exclusive benefit. And if the jury believed that to be the fact, as they clearly might under the circumstances, then the inference would not be strained nor unnatural, that Keyes, before the sale, communicated everything to Scott which had transpired between himself and the plaintiff, having anything to do with the success of the undertaking by which he was to be deprived of his property for the purpose of securing the payment of their commissions as his agents. There was no error in leaving the inquiry, whether this was so or not, to the decision and determination of the jury. It was the inference of one fact which might reasonably be drawn from others, and for that reason strictly within their province.†

Upon the subject of the defendants' liability, after directing the jury that the defendants could only be held liable for intentional misconduct in the disposition which was made of the plain-

* Cox v. James, 45 N. Y., 557.

† Justice v. Lang, 53 N. Y., 323.

tiff's property, the learned justice was asked to charge, that if the defendants, Keyes and Scott, believed, at the time of making the sale in question, that such sale was best for the interest of the plaintiff, he cannot recover in this action. The justice responded that the proposition was, in the main, true, but added that if the motive which operated on these men was not an honest discharge of their duty towards the plaintiff—if they were moved upon by the consideration of obtaining this \$13,500 or \$18,500 to themselves, or a smaller portion to one of them and a larger portion to the other, and that was their object in selling, then the action can be sustained against them. This proposition was right, for it rendered the liability of the defendants dependent upon the fact that they sold the plaintiff's property—not for him, but for themselves. In other words, that they could only be held to be liable in case they appeared to have appropriated his interest in the property to their own use and benefit. That proposition, certainly, must be sound; otherwise, the agents could appropriate their principal's property to their own use, and escape all liability for the wrong they should do him. There was no substantial difference between this ruling and the principle mentioned in the charge, by which the plaintiff's right to recover was made to depend upon the fact that the defendants must be found to have intentionally wronged him in the sale made of his property. It, as well as the entire charge, was as favorable to the defendants as they had any reason to require or expect.

The learned justice was also requested to hold and charge, that the plaintiff had so long acquiesced in this transaction before bringing this suit, that he should be precluded from bringing it, and should be held to have acquiesced and to have been satisfied with what all the defendants had done. He responded that he held the contrary of that, and added that if the jury found that the fraud was perpetrated, and this action was maintainable at any time, if he had chosen to bring it in two months or six months after the transaction came to his knowledge, he had just the same right in six years afterward, and it could not be held that he acquiesced in any such sense as to prevent the remedy which the law would give him, if his rights had been assailed or injured by any fraudulent sale by these parties. The same proposition was again repeated in nearly the same terms after the charge had been delivered. He was then

requested to hold that Price's delay, after the receipt of the account current and the knowledge of the sale, was an acquiescence in the sale, and that therefore, as matter of law, the plaintiff cannot recover anything beyond the value of the property, deducting the moneys paid out by Scott and Keyes for his benefit. The justice declined to charge these propositions, as well as the one first presented on the same subject, and held in substance, in the course of his charge, that the rule which would conclude a principal as to the correctness of an account rendered, was not applicable to this transaction, unless he knew of it in time to prevent its consummation, and to prevent himself from being divested entirely of the legal title to his property. The defendants excepted to the refusal of the learned justice to charge as requested, and also to the propositions held by him to be the law.

There can be no doubt as to the correctness of the refusals, because the requests required him to hold that there had been such acquiescence, as matter of fact, as would prevent the plaintiff from maintaining the action. No such fact was established by the evidence, and it could not, therefore, be properly regarded as proved in the case. The learned justice was also right in holding that the law, relating to the effect of an account stated, had no application in this case. For, although an account had been rendered to the plaintiff, it contained so little of this transaction as to give no adequate idea of what had been done; while the letters of the defendants, mentioning it, simply showed that a sale had been made for \$135,000, and that Scott had received and paid over to Keyes \$10,000 of the price, the residue being applied to the extinguishment of incumbrances. Nothing was stated of the receipt and disposition of the other \$5,000. And the important fact that the defendants had made the sale simply to obtain their commissions, and had divided the amount received between them, was not disclosed, but concealed under the assurance that the property had been disposed of for the plaintiff's benefit. There was, evidently, nothing in the case from which the plaintiff could be said to have approved, at any time, of that disposition of his property.

The evidence of Dewey showed that the \$5,000, paid beyond the amount mentioned in the contract of sale, did not go into the hands of either of the defendants. It was not paid by either of

them upon his debts, but by the purchasers, with the defendants' assent, to relieve the property sold from attachments served upon it after the delivery of the contract of sale, and that the purchasers seem to have insisted on, as one of the terms on which they were willing to fill the contract and take the property. The court held that if the plaintiff acquiesced in that, the amount paid should be deducted from what the defendants might otherwise be liable for. That, certainly, was making a very liberal application of the rule defining the effect of acquiescence; since there was no evidence before the jury, showing that even that disposition of the \$5,000 had been brought to the plaintiff's knowledge, and there was none from which he could infer that the debts were paid out of any part of the \$10,000; because Scott's letter, as related without objection by the judge in his charge, stated that they were paid by Keyes "apart from any money due by Payne & Co.," who were the vendees of the property. To constitute a ratification by means of acquiescence, or the omission to make the unauthorized act of the agent the subject of objection, the principal must have information giving him notice of what may have been done to his prejudice. This rule is well settled, and, without such information, there can be no ratification in a case like the present one, where the plaintiff received nothing from the transaction, and no part of the proceeds have been applied, with his assent, to his benefit.*

The plaintiff, in this case, never appears to have approved of the act of the defendants in selling this property, or in the act of the purchasers in appropriating any part of its proceeds to the payment of his debts, and has, in fact, derived no benefit from either act in any other way. His claim for redress is predicated on an unauthorized, unapproved wrong, for which, if it really existed, his right to satisfaction has in no way been relinquished.†

The refusal of the court to give the jury absolute direction, that the defendants should be credited the amount paid out of the proceeds of the sale, upon the verdict they might otherwise render in the case, was strictly conformable to the rule settled upon that sub-

* Story on Agency, §§ 239, 242; Moss v. Rossie Mining Co., 5 Hill, 137; Brass v. Worth, 40 Barb., 648; Murray v. Bininger, 3 Keyes, 107; Keeler v. Salisbury 33 N. Y., 648.

† McKnight v. Dunlop, 1 Seld., 537, 544.

ject in this State. According to that rule, a person, who tortiously disposes of another's property, cannot discharge himself from the consequences of his act by applying the proceeds in payment of its owner's debts without his authority or assent.*

The debts, which this portion of the charge referred to, were simply those that were satisfied by the \$5,000 which the purchasers at first agreed to pay toward the defendants' commissions and afterward used to compromise and remove the attachments sued out and levied under the law of the State, which took effect on the first of July. These attachments were not upon the property when the contract for its sale was entered into, and for that reason, probably, subordinate to the rights of the purchasers under it. And they were therefore not within the provision made in the contract of sale, allowing them to discharge the incumbrances out of the purchase money. The court did not hold that the plaintiff could recover the value of the property without first excluding the incumbrances upon it at the time of the sale. The proposition held, was that the debts, paid by the defendants out of its proceeds, could not mitigate the amount of the recovery unless the plaintiff had acquiesced in the act of payment. And it must have been so understood by the jury, for the amount of their verdict was \$129,699.16, which was \$10,000 less than the purchase price of the property. And this verdict was rendered nearly eleven years after the sale was made of the property, and probably included a proper allowance of interest. The debts mentioned in the charge, the payment of which was not allowed to reduce the verdict unless the plaintiff acquiesced in such payment, must necessarily therefore have been understood not to include the incumbrances by mortgages and judgments on the property. This view is further fortified by the evidence given upon the trial concerning the value of the property, for that ranged between the sums of \$135,000 and \$495,000. And it appeared that the purchasers sold portions of it, soon after the sale, at an important advance beyond the price they paid for it.

The sale was made on the 30th of June, 1853, and the court allowed the jury to regulate the amount of their verdict according to the value of the property during the residue of that year. This

* *Hanmer v. Wilsey*, 17 Wend., 91; *Otis v. Jones*, 21 Wend., 391; *Hopple v. Higbee*, 3 Zabriskie, 842; 1 Seld., 544, *supra*.

property was held by the plaintiff for sale, and there is very little probability that it would have all been disposed of before the expiration of that time if it had remained in the plaintiff's hands. It might have been sold under the incumbrances upon it, or under proceedings taken under the attachment law, which went into effect on the first day of July, in that year; but that was by no means certain, if the defendant, Keyes, before the sale, truly represented, in what he said, the friendly nature of the plaintiff's creditors toward him. If it had been sold under either, the evidence tended very satisfactorily to show that he would have had six months' time to redeem after the sale, and that would have given him the chances of the market for all the year 1853, after the date of the contract of sale. The market was an advancing one for real estate. That clearly appears from the evidence, and the plaintiff would have been in the condition, in some way, to have enjoyed its advantages if his property had not been improperly disposed of by his agents. The law, in providing relief for a party, tortiously deprived of property, held for sale, by the act of another, designs to compensate him for the loss this wrong may appear to have occasioned him; and that can only be adequately done by allowing him to recover the amount of his actual loss, including the profits he has been deprived of by means of the wrong.* Limiting the recovery to the precise period of the commission of the wrong, would often result in depriving the owner of the redress he should justly receive for the loss of his property. The rule would often prove a source of profit to the wrong-doer. It would usually be so where property should be misappropriated during the time of a rising market. To avoid that result, the owner should be allowed the fair value of the property wrongfully taken from him, to be ascertained according to its market price, within a reasonable period after the commission of the wrong; and where it consists of the number of parcels sold by the defendants in this case, amounting to so large a sum in value, a period of six months, the time allowed by the court in this case, does not appear unreasonable or improper. The state of the market during that time would justify the jury in awarding him no more than what a proper and just rule would seem to require he should be allowed to have; and there is nothing in the recent decisions of

* *Griffin v. Colvin*, 16 N. Y., 489.

the courts, depriving him of that measure of compensation, as long as the jury were satisfied that the defendants had been guilty of the misconduct upon which alone any recovery in the plaintiff's favor was allowed by the court to be had.* In *Scott v. Rogers*, four months for the disposition of the property by the owner, was not considered unreasonable as the time within which its value could be awarded by the recovery; and in *Matthews v. Coe*, the value, at the time when it was designed by the owner the property should be sold, was considered to be reasonable in determining the amount of the recovery. If the defendants had not deprived the plaintiff of the opportunity, by means of their sale of his property, there is very good reason for believing that he would have enjoyed all the benefits of the advancing market for real estate during the whole of the time allowed by the court within which its value was to be ascertained by the jury, in case their verdict was found in the plaintiff's favor. The range given was reasonable, just and proper under the circumstances of the case and the state of the market.

No other exceptions have been urged in support of the defendants' motion for a new trial, and as those considered have been found to be without foundation, the motion must be denied, and the plaintiff must have judgment upon the verdict, with costs. The motion for a new trial at the Special Term, should not have been heard and decided by the court, as long as the case was sent in the first instance, for a similar application, to the General Term, and was required by law to be there heard and decided. The order of the Special Term should, therefore, be modified so as to direct a dismissal of that application, and, as so modified, affirmed, with ten dollars costs.

It was suggested upon the argument, that the defendant, Scott, had departed this life since the verdict in the case was rendered; for that reason, the order and judgment should be entered of some date subsequent to the verdict, and preceding the death of this defendant.

DAVIS, P. J., concurred; DONOHUE, J., dissented.

Order of Special Term modified, and, as modified, affirmed.
Judgment for plaintiff, with costs.

* *Suydam v. Jenkins*, 8 Sand. S. C. Rep., 614; *Scott v. Rogers*, 81 N. Y., 676; *Matthews v. Coe*, 49 N. Y., 57; *Baker v. Drake*, 53 N. Y., 211, 219.

JAMES A. McCOMBIE AND OTHERS, RESPONDENTS, v. JEREMIAH V. SPADER, IMPLEADED WITH WALTER S. HICKS, APPELLANT.

Warehouse receipt—fraudulent sale—rights of bona fide purchasers.

Where a warehouseman gives a receipt for property fraudulently purchased, some of which, at the time of giving the receipt, has not been, but subsequently is, received by him, a person, making advances to the fraudulent purchaser on the strength of the receipt, without notice of any fact calculated to awaken suspicion, and to whom it is transferred, is entitled to hold so much of the property as was in the warehouse at the time the advances were made.

The plaintiffs claimed that the defendant Spader gave a receipt for some flour before it had all been received by him; the defendant testified that he did not give the receipt until the flour was received; the plaintiffs were allowed to prove that the defendant had, upon another occasion, given a receipt for flour before it was received; *held*, that the evidence was improper, as the transaction had no possible connection with the one in controversy; it did not tend to prove that the receipt given in this case was issued before the flour was in the warehouse.

APPEAL from a judgment in favor of the plaintiffs, entered upon the verdict of a jury, and from an order of the Special Term denying a motion for a new trial. The facts are stated in the opinion.

Andrew Boardman, for the appellant.

A. J. Vanderpoel, for the respondents.

DANIELS, J.:

This action was brought to recover possession of 264 barrels of flour, sold and delivered by the plaintiffs, to Walter S. Hicks on the 8th of May, 1860, and detained from them by the defendant. Evidence was given tending to show that the sale was procured by the fraud of the purchaser; but before any action was taken by the plaintiffs for its disaffirmance, the flour was delivered to the defendant, as a warehouseman, who issued a receipt, stating that he had received it in store, and held it for account and risk, and subject to the order of Thomas, & Benham.

The flour was delivered to him on the 9th day of May, 1860, and the receipt was issued that day. During the same day, Hicks transferred the receipt to Thomas & Benham, and received from them, by their check paid that day, an advance of four dollars per barrel upon 214 barrels of the flour, and six dollars per barrel on the other fifty barrels.

The evidence tended to show that the flour was delivered at the defendant's warehouse before the hour of three o'clock in the afternoon, and that the advance was made upon the receipt by Thomas & Benham sometime before noon; but the defendant testified that he did not give the receipt until the flour was received. If he was right in that statement, then the transaction, so far as himself and the persons making the advance upon the receipt were concerned, seemed to be legal and regular. Whether he was or not, under the evidence, was a question of fact for the jury to decide. Upon this subject the plaintiffs were allowed to show, by one of the witnesses, that the defendant, upon another occasion, had given a receipt for other flour before it was received at his warehouse. Before this evidence was given, the defendant objected to its reception, and excepted to the ruling allowing it to be given. As that transaction had no possible connection with the one in controversy, it could not properly tend to prove the fact that the receipt, on which the advance was made, was issued before the flour was in the warehouse. And yet it is manifest that the jury would be very likely to use it for that purpose; they would be disposed to infer from it that the defendant was in the habit of carelessly issuing receipts in that manner, and that he, therefore, probably did so in the instance in suit. This would directly prejudice the defendant in his defense, when really it could not strictly be used for any such purpose.

The evidence was clearly improper, and a general objection was sufficient to present the point based upon the ruling admitting it.* And, as the evidence had some bearing upon one of the points in issue, the ruling admitting it cannot be disregarded.†

In any view taken of the evidence, some of the flour must have been received at the defendant's warehouse at the time when the money was advanced to Hicks, upon the transfer by him of the

* *Merritt v. Seaman*, 2 Seld., 168. † *Worrall v. Parmelee*, 1 Com., 519, 521.

receipt to Thomas & Benham. If the defendant's evidence was true, it was all there; and yet the court held that, if the receipt was issued by the defendant before all the flour was received at his warehouse the defendant could not hold it for the persons making the advance upon it, even if they made it upon the credit of the receipt, without notice of the purchaser's fraud, or notice or knowledge of any fact or circumstance which ought to have put them on their guard, as men of ordinary prudence. Under this ruling, even if every barrel of the flour was in the warehouse before the advance was made upon the receipt, and the persons making it acted in the most perfect good faith, they could not hold the flour as security for the advance.

The court also held that the receipt was void, if issued prior to the whole of the flour being actually received in store or on the defendant's premises, and that he could not justify the detention of the property under it, even though Thomas & Benham made an advance on its security. If the receipt was issued as this proposition contemplated it might have been, there can be no doubt but that the defendant was guilty of a crime in issuing it under the statute forbidding that to be done, where the property mentioned in it shall not be, at the time, in store.*

The object of this statute was to prevent the issuing of such instruments before the property was received, in order to protect persons dealing with them in good faith, and confiding in the truth of their statement, from loss; and it should be so applied as to correct that abuse, as far as that can practically be done. It was no part of its purpose to increase the jeopardy of innocent dealers in personal property. And that would very clearly be done by holding the receipt ineffectual because the property was not all in store at the time when it was issued.

Receipts of this description are treated, in commercial transactions, as the representatives of the property mentioned in them, and are dealt with, under the sanction of the law, as muniments of the title. They are substitutes for the property, affording important facilities for its transfer, either absolutely or by way of security. And the statute was enacted for the purpose of increasing, instead

* 8 N. Y. Statutes at Large, 667.

of diminishing the security of persons dealing in property by means of them.

It should be so construed as to promote that end.

But that would not be done by holding them void because the property was not all received when they were issued.

As between the maker and the person receiving such a receipt, knowing its unlawful character, it would undoubtedly be entirely inoperative as long as that state of things continued.

But to extend that consequence so far as to defeat the rights of an innocent purchaser, after the property wholly or partially had been put in store under it, would be characterized by a degree of harshness which the statute has nowhere required to be applied.

A person who, in good faith, became the purchaser of such a receipt, either absolutely or by way of security for a valuable consideration advanced upon the faith of it, was always protected before the enactment of the statute, when it truly represented the property mentioned in it, against a claim of title like that relied upon by the present plaintiffs.

That protection resulted from the fact that the property was actually, at the time of the transfer, in store, as the receipts stated it to be.*

And it reasonably resulted from the circumstances, that, by the storage of the property and the receipt issued for it, the person having title to the latter, could, by means of it, dispose of the former precisely the same as if the property itself were manually passed over to the person buying or making advances upon it.

The ability was thereby secured of selling or hypothecating the property, simply by transferring the receipt.

And all that was required for that purpose, was that the person proposing to dispose of the receipt, had, at the time, the property in store according to its terms, with the legal authority to transfer the title to it.

It was simply a substituted mode of selling property which the vendor had the right to dispose of.

And the power to do it existed, if the property was in store, with

* *Wilkes v. Ferris*, 5 John., 335; *Gibson v. Stevens*, 8 How. [U. S.], 384, 390; 8d R. S., 5th ed., p. 76, § 8; *Cartwright v. Wilmerding*, 24 N. Y., 531; *City Bank v. Rome*, etc., R. R. Co., 44 Id., 136.

the right to transfer the title at the time of the sale ; under those circumstances, the seller could dispose of it either by delivering the property over under the terms of his sale, or constructively doing it by transferring the receipt.

In either case it would be the fact that he had the property in store at the time he proposed to dispose of it ; that would enable him to render the sale complete either by delivery in fact or by a transfer of the receipt as representing it.

And that would be exactly the same whether it was issued before the property was all in store or afterward, provided that affected by the sale was there at the time of making it.

No reason existed requiring any change in this mode of selling property when the statute was passed, and it contains nothing appearing to have been intended to produce any change in it.

The object which the legislature seems to have designed to accomplish, by its enactment, was to render it more certain than it previously had been, that the receipt should represent the property offered for sale, or by way of security for advances, at the time when the party proposed to make such a disposition of it.

And no good reason appears for making any distinction in this respect between transactions occurring before and since the statute.

The receipt still continues in the same manner to represent the property, if the party has it in store when he proposes to dispose of it, and the effect of the transfer of it is the same as a constructive delivery of such property as may at the time be represented by it.

And the appearances inducing the confidence of the party proposing to act upon it, and the reasons requiring him to be protected, are in no sense changed by anything which the statute contains.

At the time when the advances were made to Hicks upon this receipt, it not only professed to represent property in store, but to a certain extent, at least, that representation was true, for some of the flour was then at the defendant's warehouse ; and so far, but no farther than that, it entitled the persons to protection who made the advances, provided they did so without notice of any fact calculated to awaken suspicion of the existence of the plaintiffs' rights.

A fraudulent purchaser of another's property, may transfer a good title to it to a *bona fide* purchaser, for value, where the pur-

chase is made before the seller has taken any step to disaffirm the sale on account of the fraud. And the sale may be rendered as effectual by properly passing to the purchaser the legal evidence of title and possession, as by actually handing over the articles themselves which may be the subject of it.

This principle includes all transactions affecting the title to personal property, whether it be absolutely transferred or only by way of security for advances made upon it. The effect is the same, whether the transfer is completed by passing the articles sold from hand to hand, or by a delivery of the document representing it, which the law has sanctioned as constructively doing the same thing. Either, in a case like the present one, is sufficient to bring the transaction within the salutary rule so frequently repeated and applied, that where a loss must be sustained by one of two innocent persons on account of the fraud or misconduct of another, it must be borne by the one who supplied him with the means and ability of producing it.*

The judgment and order denying the motion for a new trial should be reversed and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and LAWRENCE, J., concurred.

Judgment reversed and new trial ordered, costs to abide the event.

BARNABAS HAMMETT ET AL., RESPONDENTS, v. JOHN T. BARNARD ET AL., APPELLANTS.

Promissory note — consideration — failure of.

Where a contract for the sale and purchase of merchandise is entered into, and, thereafter, a bill of lading is delivered to the purchaser, differing in its provisions from the terms of sale agreed upon, and the purchaser, on receiving it, gives his note for the amount appearing due thereby, the question whether the note was given with knowledge of the alteration of the terms of the contract appearing in the bill of lading, is properly submitted to the jury, and their finding is conclusive.

* Crocker v. Crocker, 31 N. Y., 507; Rawles v. Deahler, 3 Keyes, 572.

APPEAL from a judgment in favor of plaintiffs and from an order denying a motion for a new trial.

The facts are stated in the opinion.

Mr. Benedict, for the appellants.

Mr. R. H. Huntley, for the respondents.

DAVIS, P. J. :

This action is brought on a promissory note made by the defendant, John T. Barnard, to the order of all the defendants in their firm name, and by them indorsed to the plaintiff. The making and indorsement of the note are admitted by the answer, and the defense set up is a failure of consideration. The answer alleges that before the making of the note, the defendants had bought, and the plaintiffs, by their agent, had sold and agreed to deliver to them a cargo of coal; that defendants were applied to by the agent of plaintiffs to give them said note for said coal, and, although the coal was not then delivered, the defendants, on such request and for the purpose of accommodating plaintiffs, gave the note in question; that plaintiffs did not deliver the cargo of coal or any part thereof, wherefore the consideration of the note wholly failed.

It will be observed that the only issue between the parties was whether the coal had ever been delivered. The contract of purchase and rate was admitted by the answer, and no question was made by the pleadings as to its validity, either by denial or by direct averment. The issue to be tried was, whether there had been a *delivery* according to the terms of the contract.

It appeared substantially, on the trial, that a broker applied to the defendants for an order for a cargo of coal. The defendants, after some negotiation, gave him an order for a cargo of the coal dealt in, and to be shipped by plaintiffs at five dollars and seventy-five cents per ton, to be delivered in their carts as convenient as practicable to their coal-yard. The broker took the order to plaintiffs, who refused to sell the coal otherwise than to be delivered on board the boat which would transport the same from Hoboken across the river to New York. The freight being fifty cents per ton, plaintiffs proposed to the broker to accept the order at five

dollars and twenty-five cents per ton on board, and the broker consented to this change; the order was altered accordingly. The coal was subsequently shipped, and a bill of lading was made out, which recited that the coal was shipped by plaintiffs in good order on board the barge called the McGurkey, to be delivered in like good order to the defendants at Gouverneur street, East river, they paying freight for the same at the rate of fifty-five cents per ton.

The barge arrived with the coal and was made fast to the wharf at Gouverneur street, which arrival seems to have been made known to the defendants.

The bill of lading was sent to the defendants, and on the twelfth of October the plaintiffs sent to the broker a bill for the coal at five dollars and twenty-five cents on board, from which the broker made out a bill in his own name, stating in substance that the defendants bought of him the coal (sold for account of plaintiffs) per barge McGurkey, "202 tons, Thomas Stoor, \$5.25 on board, \$1,060.50, advance freight \$12.12. Cr. by cash \$12.12, 3 months' interest \$18.56, making a debit of \$1,079.06."

The defendants gave the note for the balance of debit as shown by this bill.

On the part of defendants, evidence was given tending to show that the note was given without noticing the words "on board" in the bills, or the alteration as to price, and that the broker requested the note to be given because one of plaintiffs was about leaving for Philadelphia, and wished to take the note with him, and that defendants gave same to accommodate plaintiffs, protesting that the coal had not yet been delivered.

The broker testified that the note was given in settlement of the bill delivered by him, and that he delivered the note to plaintiffs.

The barge was, by some accident, after the note had been given, broken away from the wharf and carried up the river and sunken, with her cargo, which was lost. The court submitted the question to the jury, and charged, in substance, that if the jury found that the defendants had notice of the change in the contract, by the reason of the bill having been rendered by the broker for and on account of plaintiffs, and assented to the change, and gave the note accordingly, the plaintiffs were entitled to recover; but if they believed that at the time the defendants made the settlement, the

contract was that the coal should be delivered in their carts, and did not waive that condition of the contract by their action, then the defendants would be entitled to their verdict.

The jury found for the plaintiffs. Various questions were raised in the form of requests to charge, touching the validity of the contract under the statute of frauds, and the sufficiency of acceptance under that statute, and exceptions were taken to the rulings of the judge.

We do not think there was any error in the rulings; but, under the pleadings, the contract of sale and purchase being admitted, those questions were not within any issue presented. The defendants, having admitted by their answer the contract of sale and purchase, took the affirmative on the issue whether there was a delivery of the coal pursuant to the contract, and plaintiffs, under the admission of the answer, were entitled to a verdict on the note, unless the defendants should establish the alleged failure of consideration by reason of non-delivery of the coal.

The question, therefore, whether the defendants, by settling and giving their note for the bill, as presented by the broker, for coal at five dollars and twenty-five cents, delivered "on board," assented to the alteration which the broker had made with plaintiffs, or were still at liberty to insist that, by the terms of the contract, the coal was to be delivered "in their carts" at five dollars and seventy-five cents, was one which, under all the circumstances, belonged to the jury. We do not think we should be justified in interfering with their verdict.

The judgment should, therefore, be affirmed.

DANIELS and WESTBROOK, JJ., concurred.

Judgment affirmed.

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JOHN E. RISLEY, RESPONDENT, v. THE INDIANAPOLIS,
BLOOMINGTON AND WESTERN RAILWAY COM-
PANY, APPELLANT.

Ultra vires—acts of officer of corporation, when.

It cannot be inferred, from the simple fact that a person is the president of a corporation, that he has authority to contract on its behalf.

Before one act can be accepted as the ratification or confirmation of another, the party acting must have some knowledge or information, at least, of its existence.

A president of a corporation, taking an assignment of a contract, theretofore entered into between the corporation and a contractor for constructing its road, etc., acts as trustee of the corporation and its stockholders, and not as the contractor's assignee.

APPEAL from a judgment of the Supreme Court, entered in favor of the plaintiff, on the report of a referee.

The action was brought by the plaintiff, to recover a fee of \$50,000, for alleged services in obtaining for, and introducing to, the Danville, Urbana, Bloomington and Pekin Railroad Company, contractors who would undertake to build its road, and for the conversion of certain municipal bonds, alleged to have been agreed to be delivered by said company in payment for said services.

The defendant is a corporation, formed in 1869, under the general laws of the States of Indiana and Illinois, by the consolidation of the Indianapolis, Crawfordsville and Danville Railroad Company, and the said Danville, Urbana, Bloomington and Pekin Railroad Company. By the act of consolidation, the corporation, defendant, assumed all the liabilities of the constituent roads.

Samuel C. Wilson was president of the Indiana, and a director of the Illinois corporation, and Clark R. Griggs, president of the latter, and subsequently of the defendant. Wilson appears to have conducted the negotiation between the plaintiff and Griggs, the president of the Illinois corporation, and, by authority of Griggs, offered to the plaintiff the \$50,000, for the recovery of which this action was brought.

Edmund Wetmore, for the appellant. An agent can only bind his principal by his acts, when he is authorized to act. (*Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y., 599, 632.) The power given to a board to manage the affairs of a corporation, is exclusive in its character. (*McCullough v. Moss*, 5 Denio, 575.) The president of a corporation is not, *virtute officio*, empowered to contract for the corporation. (*Dabney v. Stevens*, 10 Abbt. Pr. [N. S.], 39; *Adrianse v. Roome*, 52 Barb., 399; *Marine Bank v. Clements*, 3 Bos., 600; *Soper v. Buffalo & Roch. R. R. Co.*, 19 Barb., 310; *Nat. Bank v. Norton*, 1 Hill, 572; *Jackson v. Campbell*, 5 Wend., 572; *Hoyt v. Thompson*, 5 N. Y., 320.) The contract of the president can only bind the corporation when authorized or approved by it. (*Olcott v. Tioga R. R.*, 27 N. Y., 546; *Mech. Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y., 632; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y., 30.)

James Clark, for the respondent. That the contract in this case was valid and binding on the corporation. (*Supervisors v. Schenck*, 5 Wall., 784; *Know Co. v. Aspinwall*, 21 How. [U. S.], 539; *Bissell v. Jeffersonville*, 24 How., 288; *Gelpcke v. Dubuque*, 1 Wall., 203.) If the act is incident to the duties with which the officer is charged, the company is bound. (*Pratt v. Hudson R. R. R.*, 21 N. Y., 305.) Those who created the trustee and clothed him with power, should suffer. (*Far. & Mech. Bank v. Drov. Bank*, 16 N. Y., 133; also 4 Duer, 219; *Welland Canal Co. v. Hathaway*, 8 Wend., 480.)

DANIELS, J.:

The application for the removal of the cause into the Circuit Court of the United States, was properly denied, because it was not shown by the petition, that the parties were citizens of different States at the time when the action was commenced, and the defendant, being a corporation, was not entitled to such removal upon any other ground.*

The contract, on which the decision of the referee allowed the plaintiff to recover the judgment appealed from, was made with

* *Holden v. Putnam Fire Ins. Co.*, 46 N. Y., 1; *Plehner v. Phoenix Ins. Co.*, 6 Lansing, 411; *Cooke v. State National Bank of Boston*, 52 N. Y., 96.

the president of the Danville, Urbana, Bloomington and Pekin Railroad Company, a railroad corporation at that time existing under the laws of the State of Illinois. This contract, as it was found to be proven by the evidence, was made on or about the 15th day of July, 1867.

It stipulated for the payment, by the company to the plaintiff, of the sum of \$50,000, for procuring contractors, who entered into a contract to construct and equip its railroad. At the same time, an order was drawn upon the president of the company by the contractors, in the plaintiff's favor, for county, city and township bonds, amounting to the sum of \$36,666.66, bearing ten per cent interest, and accepted by the president, which the referee found was delivered to the plaintiff as security for the payment of the amount claimed to be due him under the agreement.

The company made default in the payment of the bonds, upon the order, and the judgment was directed for that default as well as the non-performance of the contract.

But the whole amount of the recovery does not exceed the sum unpaid upon the order. If the judgment can be sustained on either demand, it is right and must be affirmed.

The defendant, which, by the consolidation of the railroad company named and another having its terminus at the same place, succeeded to all the rights and assumed all the liabilities of those two companies, claims, in support of the present appeal, that it can be sustained upon neither ground, for the reasons which will now be considered.

The president, with whom the contract for the payment of the plaintiff was made, had no special or direct authority from his company to enter into any agreement of that kind. And no evidence was given, from which it could be inferred by the plaintiff that the company, whose officer he was, had either held him out, or permitted him to represent himself, as having authority of that kind.

The circumstance that he was president of the company, was not of itself evidence of the existence of such authority, for it does not ordinarily appertain to the duties of persons acting in that capacity.

He was at most the agent of the company, created and existing under a special legislative act defining the rights and privileges of the body, and the manner in which they should be enjoyed. This,

the plaintiff is to be regarded as knowing. For all persons, dealing with the officers or agents of corporations, are bound to know that they act either under its charter or by-laws, or the usages which may be shown to exist, defining the extent of their authority.

They must, in doubtful cases, acquaint themselves with the extent of that authority, or otherwise submit to the consequences resulting from their omission to do that.*

The charter of the company gave the immediate government and direction of its affairs to a board of thirteen directors, having power to elect one of their number president, a majority of whom constituted a quorum for the transaction of business.

But it conferred no authority on the person who should be elected president, to bind the company by his contracts.

His power, in that respect, appears to have been defined exclusively by the by-laws enacted by the company. And it was restricted to the management of all negotiations with other corporations, companies or individuals, touching their mutual interests and the claims of either party on the other, and to entering into or concluding all such agreements or contracts, with any of such parties as should be approved by the board of the executive committee. This entirely withheld the power to make contracts binding on the company, unless the approval of the executive committee was first obtained for that purpose.

And it deprived him of the power of entering into the agreement which the referee, upon sufficient evidence, has found was made by him with the plaintiff for the payment of the \$50,000. The case of the *Merchants' Bank v. State Bank*,† was relied upon as sustaining the validity of all contracts entered into by officers of corporations.

But it clearly could not have been intended by that decision, to sanction so broad an extension of the law affecting transactions of this description.

Very broad propositions, it must be confessed, were stated in

* Angell & Ames on Corps., 4th ed. (S. S.), 291, 297; North River Bank v. Aymar, 3 Hill, 292; Mechanics' Bank v. New York & New Haven R. R. Co. 3 Kernan, 599, 631, 634; McCullough v. Moss, 5 Denio, 567; Adriaance v. Roome, 52 Barb., 399; Dabney v. Stevens, 40 Howard, 341, 345, 346.

† 10 Wallace, 604.

the opinion, but perhaps none too much so for the facts and evidence in the case which the court then decided.

The one chiefly relied upon to sustain the contract in this case, states the law to be, "that where a party deals with a corporation in good faith, the transaction not being *ultra vires*, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists." *

But even this does not extend as far as the purposes of the plaintiff's case require, in order to sustain his recovery, for the president of the company was not invested with a defective or irregular authority to bind the company by his contracts. He had no authority whatever for that purpose.

And where that is the case, and the officer has not been permitted to act as though he had the authority, there is nothing in that decision holding that he can bind the company.

But this proposition is inapplicable to the present case, because there was a circumstance brought to the plaintiff's knowledge, according to his own evidence, which ought to have excited his suspicions that the president had no power to bind the company by the agreement; for he says that Griggs, the president, and Wilson, one of the directors acting with him, had not brought with them proper evidence of their authority to contract for the building of this and the other road, and it was decided that the execution should be adjourned over for them to go home, convene their boards of directors, and get them to do whatever was necessary to be done about the contract for building the roads. If they could not, for want of power, enter into contracts for the construction of the road, which was a substantial part of what the corporation was created to do, it is difficult to see how it could, with any propriety, be assumed that the power existed without any action of the board, which would authorize the president to make the contract with the plaintiff upon which he has been allowed to recover.

The fact that the president could not, without specific authority, bind the company by one agreement, should have been accepted

* 10 Wallace, 644.

as quite conclusive evidence of the same want of authority to render the other obligatory upon it.

One was a fair inference from the other.

And the plaintiff should be strictly held to all its legal consequences, because, as a lawyer, he may be deemed to be familiar with all legal rules applicable to his case.

The plaintiff, however, insists that the making of the contract for the construction of the road, and with the authority afterwards conferred for that purpose by the company, in effect adopted and ratified the agreement which the president made with him for the payment of the \$50,000.

But that cannot be so, because there was nothing in the agreement made for building the road, by which even the existence of the one made with him, was assumed.

It, in no way, entered into the agreement for the construction of the road, and was not brought to the notice of the board of directors in any way whatever.

And they cannot, with any propriety, be held to have adopted or ratified, by that act, another of an entirely different nature, which they knew nothing about.

The fact that it was brought to Wilson's notice, at the time when the agreement with the plaintiff was made, was not notice to the company, or the board of directors, for any such purpose.

The board was the body which acted, and no notice was given to it of the president's attempt to bind the company for the payment of the money to the plaintiff.

Before one act can be accepted as the ratification or confirmation of another, the party acting must have some knowledge or information, at least, of its existence.*

Another circumstance relied upon as a ratification of the act, by which the agreement with the plaintiff was made, is the admission contained in the answer, that the order received by him was accepted by the company. But this admission is not sufficient for that purpose, because it in no way concedes that the order had any connection with the agreement.

It is not admitted that the order was drawn, accepted or received

* *Brass v. Worth*, 40 Barb., 648; *Hays v. Stone*, 7 Hill, 128, 181, 183; *Keeler v. Salisbury*, 33 N. Y., 648; *Smith v. Tracy*, 36 Id., 79.

to secure the performance of the agreement, or that it had any relation whatever to it, or that the company knew anything of it.

The admission is that it promised, at the request of the contractors, to deliver the plaintiff the bonds, provided they became entitled to them by the performance of their contract; certainly no ratification of the agreement with the plaintiff, can be inferred from such a promise.

And there is nothing in the evidence extending its effect in that respect.

The order was drawn by the contractors who agreed to build the railroad, and it requested and directed the delivery to the plaintiff of a portion of the bonds which they were, by their contract, to receive by way of compensation for what they were to do in its performance.

It indicated a payment by them upon some obligation they had incurred to the plaintiff, instead of the securing or settlement of a demand existing in favor of the plaintiff against the railroad company.

Neither by the import or terms of the order, could the company have inferred from it, that it was given or accepted to secure any debt the plaintiff claimed to have against the company.

And for that reason, as long as the company, or its board of directors, had no notice that it was to be held by the plaintiff as security for the payment of his demand, its acceptance, or the promise admitted in the answer, constituted no ratification or confirmation of that demand.

The circumstances under which the order seems to have originated, exclude the presumption that notice of its purpose or use, could have been given to the board of directors.

Wilson, who aided the plaintiff in procuring the contractors who were to build the road, and received an order himself for \$10,000 of the county, city and town bonds, and who evidently had no motive to misrepresent the facts, was sworn and examined as a witness on his behalf.

And in the course of his evidence, he stated that the contractors agreed at first to build the railroad for \$5,000 per mile, in county, city and town bonds, in addition to the other compensation it was agreed they should receive.

And after that, without making any reduction in the other amount, the payment in those bonds was increased to \$6,500 per mile.

This, he said, was done at the instance of Clark R. Griggs, who was the president of the company.

And the object was to charge the excess upon the company for building its road, and through the contractors to divide that excess between himself, Wilson, a director and president of the other railroad company, the plaintiff, and the contractors.

And he stated that the division was so far made, at that time, as to have orders drawn for \$120,000, in round numbers, by the contractors, one being in his own favor for \$10,000, and the residue for equal amounts, one in favor of the president of the company, another in favor of Wilson, one of its directors, and the other in favor of the plaintiff.

And these orders were then accepted by Mr. Griggs, and delivered to the persons who were to receive them, he receiving the one intended for himself.

This witness was corroborated in this statement, by the evidence of the defendant's witness, Alton, who was one of the contractors.

For he says that the price in bonds was first fixed at \$5,000 per mile for building the road, and afterward advanced, on the contractors' learning that the work would probably prove more expensive than at first it was supposed to be, so that they should receive \$200 or \$300 more per mile in bonds.

Then he said, that Griggs said, they could raise \$6,500 per mile. That he understood how much the contractors were to have net, and that they were to pay a certain amount for himself, the plaintiff and others, of the bonds, as a commission or brokerage.

And that it was arranged between Griggs, Wilson and Risley, that a certain portion was to be allowed to them.

He then added that he was very confident, that, in the arrangement he had with Griggs, it was not spoken of, until it was arranged between them how it was to be divided.

To carry it out, he stated that an order was first drawn for the entire \$120,000, and accepted by Griggs. But that was afterward divided into the four orders mentioned by Wilson, so that each could have his own share at once, without being at all dependent

upon the honor which is supposed to exist in such cases, but, nevertheless, has sometimes proved to be disregarded. The circumstances very decidedly sustain the probabilities of these statements. For, the orders were all made out by the plaintiff, signed by the contractors, accepted by Griggs, and distributed in the manner mentioned at the time when the contract was entered into.

The plaintiff, though afterward on the stand as a witness, made no attempt to deny these statements, but simply left the case upon his former evidence, in which he said that he did not know whether the contractors received any consideration for drawing these orders; and Griggs, while he denies being a party to any such arrangement, still admits that the orders were drawn, accepted and divided as the others stated they were, and that he received one for between \$36,000 and \$37,000.

He also says that he did not inform the board of directors that he had received such an order, neither was the counsel of the company, who was with him in the city attending to the completion of the contract to build the road, informed of it, or of the arrangement made for this division of \$120,000 of the bonds.

In view of the great improbability that the contractors would voluntarily have proposed to give away so large a portion of their compensation, if it had ever been designed they should receive it as such, and the reasons which must have operated upon Mr. Griggs, by way of inducing him to deny his complicity in this piece of inexcusable knavery, the direct evidence of the two witnesses, swearing to the contrary, and the inherent probability of the truth of their statements, no reliance can be placed upon his denial.

The whole weight of the case is against him on this subject, and it must be concluded, that, for a consideration he provided the contractors with, he enabled them to compensate himself and Wilson for a shameless violation of the duties which the confiding stockholders and directors had intrusted them with performing.

After being implicated in that misconduct, no reason could exist for supposing that he would so far explain the matter to the board of directors as to secure any action of theirs amounting to a ratification of that portion of the transaction in which the plaintiff was allowed even the appearance of profiting.

And, certainly, his own acceptance of the orders, as president of the company, could be attended with no such result.

For, as long as he had no authority to make the agreement to pay the plaintiff the \$50,000 for procuring the contractors, he was equally without authority to bind the company by a ratification of it.*

The remaining question in the case is, whether the company was shown to be liable to the plaintiff upon its admitted promise to pay the bonds on the order.

The answer denies that liability. By the contract, the \$1,500 per mile, which was added to the first amount which the contractors were to receive in bonds, did not become payable until the ties and iron were laid upon the road. And the bonds, payable by the terms of the order, were to be paid "out of the \$1,500 per mile," which, pursuant to the contract, "was to become due and payable to the contractors upon laying the iron on the railroad."

This order, with its acceptance, was conditional upon the performance of the contractors, extending so far as to lay the ties and iron upon the road.

It was for the payment of the amount mentioned in it, out of the sum to become due and payable to the contractors who drew it, when they laid the iron upon the road.

That, the proof showed, they never did. And the amount, stipulated for that service, accordingly, was never earned by them.

Soon after they took the contract, they failed in its performance, and surrendered and assigned it to Mr. Griggs, the president of the company, and he afterward went on and performed it.

This performance was not made in their interest, or for their account, but entirely independently of them, and for his own benefit, so far as that could be done by him as an officer of the company whose interests he was bound to promote and protect.

They were not entitled to any part of the compensation earned by this performance, and the plaintiff, as their assignee under the order, stood in no better situation.

For he was only to receive, according to the terms of the order a portion of what should become due and payable to the con

* *Marsh v. Fulton County*, 10 Wallace, 676.

tractors, pursuant to their contract, when the iron should be laid upon the track.

And, as nothing ever did become due or payable to them for that, on account of their failure to perform, or to procure the performance by any other person in their behalf, the plaintiff has no valid claim against the company under the terms of the order received by him.

And besides that, as the assignment of the contract was made to the president of the company, and he afterward constructed the railroad under it, while occupying that position, he did it substantially as the company, and not as the contractors' assignee; what he did, was as a trustee for the company and its stockholders.*

They, and not he, were entitled to the profit of what he did while acting as a director of the company and the president of its directors.

And it can make no difference in the plaintiff's favor if this officer, in the end, so far sacrificed his duties to his interests as to secure from the company, for what he did, the unlawful stipend of bonds, put into the contract at his instigation and in part for his profit.

For the plaintiff has shown no title to them, and no right to require compensation for the amount of his order from the company. He may be entitled to a reasonable compensation for his services and advice in aiding the president of the company, as his counsel, in making the contract executed by the contractors and approved by the company,† but that cannot sustain the present judgment, for it forms no basis of its recovery.

As the case now stands, there seems to be no theory upon which this judgment either can or ought to be sustained.

It should, therefore, be reversed and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and LAWRENCE J., concurred.

Judgment reversed and new trial ordered, costs to abide event.

* Butts v. Wood, 87 N. Y., 817; Coleman v. Second Avenue Railroad Co. 88 id., 201; Ogden v. Murray, 89 id., 202.

† Hooker v. Eagle Bank of Rochester, 80 N. Y., 83.

ISAAC T. HUNT AND OTHERS, APPELLANTS, v. MATTHEW
T. BRENNAN AS SHERIFF, ETC., RESPONDENT.*Notice of appearance — withdrawal of — when allowed.*

Brown, Hall & Vanderpoel, being authorized to appear for the defendant in all actions regularly commenced against him and none other, appeared as attorneys for him in this case, believing at the time they did so, that the summons had been personally served upon him, while in fact it had not; the defendant did not know of an appearance until after the service of the complaint; on the application of the defendant, an order was made permitting him to withdraw the notice of appearance; *held*, that this was proper.

APPEAL from an order.

On the 17th of January, 1874, on affidavits presented to Mr. Justice LAWRENCE, an order was granted at Special Term, requiring the plaintiffs to show cause why a notice of appearance, theretofore served in the action, of Brown, Hall & Vanderpoel, as attorneys for the defendant, should not be countermanded and withdrawn. The affidavits showed that the summons, which was in an action for an escape, had never been served on the sheriff, and that he had not directed or authorized any one to appear for him in the action, and that the notice of appearance was inadvertently served, under the erroneous supposition that the summons had been served personally on the defendant, the summons having been delivered to the attorneys by a subordinate in the sheriff's office, without informing them that the same had not been served on the sheriff. That the attorneys were authorized to appear for the sheriff, in all actions regularly commenced against him in his official capacity, and none others. It further appeared that the defendant did not know of the appearance, until after the service of the complaint; and that the fact that the summons was not personally served, was not known to the attorneys, until after the complaint was served. An order was made, directing the withdrawal of the notice of appearance, from which the plaintiffs appealed.

Convers & Lyman, for the appellant.

Brown, Hall & Vanderpoel, for the respondents.

FIRST DEPARTMENT, MAY TERM, 1874.

PER CURIAM.

The decision of this motion in favor of the sheriff, was predicated of the fact that the notice of appearance, served on his behalf, was inadvertent and a clear mistake, no authority having been given therefor by him. The proofs submitted upon the hearing, fully justify this conclusion, and the order appealed from, is right. It may be that the process should have been served upon the sheriff; but if that ceremony was not necessary, and a service upon the undersheriff was sufficient, no injury results to the plaintiff. Whatever rights he secured by that proceeding remain. In the case of *Becker v. Lamont*,* the decisions bearing upon the exercise of the power to relieve a party from an appearance, put in on his behalf, are collated and criticised; and it will be found that the courts have exercised the authority vested in them, even in relation to stipulations made in open court.†

The order appealed from, seems to have been made on proper and sufficient grounds, and it should therefore be affirmed.

Ordered accordingly.

IN THE MATTER OF THE FINAL ACCOUNTING OF OBADIAH
N. CUNNINGHAM, EXECUTOR OF DANIEL CUNNINGHAM,
DECEASED.

Executor — Accounts.

The executor presented a claim against the estate, for money paid and advanced for divers family expenses, such as rent and other necessities, and for expenses in taking the testator to the asylum, and for his clothing, nursing and medical attendance, amounting to \$371. The surrogate refused to allow the claim, as all of the disbursements were made during the lifetime of the testator; *held*, that the claim should have been allowed.

APPEAL from a decree of the surrogate of the city of New York, made on the final settlement of the accounts of the executor.

F. G. McDonald, for the executor, appellant.

Edward F. Brown, for the respondent.

* 13 How. Pr., 28.

† The Hiram, 1 Wheaton Rep., 440, 1 Hoff. Ch. Practice, 28, 29.

DAVIS, J.:

The questions raised are chiefly of fact, and grow out of conflicting evidence. It was not disputed that the executor received from the wife of the testator, some time before his death, a number of government bonds, which he converted into money. The controversy in respect to the bonds, was whether the executor paid the proceeds to his testator in the lifetime of the latter. The auditor, upon conflicting evidence, has found that he did not, and has charged the executor with \$350, the value or proceeds of said bonds, and with interest thereon, amounting in the whole to \$497. The learned surrogate has confirmed the finding of the auditor. We do not think the finding so palpably against the weight of evidence, that an appellate court would be justified in reversing it. The executor proved that in the lifetime of the testator, and while the latter was confined in the lunatic asylum on Blackwell's Island, he paid and advanced for divers family expenses, such as rent and other necessities, and for expenses in taking the testator to the asylum, and for his clothing, nursing and medical attendance, sums amounting to \$371, the account for which he presented as a claim against the estate, upon and as part of his accounting. The auditor rejected this claim on the ground, as stated in his findings of fact, "that the executor did not disburse the various sums as charged in schedule D of his account, and amounting to \$371, being the whole amount included in schedule D, as executor, on account of the estate of the deceased," from which finding he finds as a conclusion of law, "that no part of schedule D should be allowed to the executor, as all of the disbursements, as therein charged, were made during the lifetime of the deceased."

Of course, this account should not be allowed as disbursements made by the executor. The account did not purport to be of that character. Schedule D recites distinctly, that the claim is for sums of money advanced while the testator was insane, with the consent and at the request of his wife, for his and her support and comfort, such sum being actually necessary for their maintenance. No good reason exists to prevent the executor from bringing in and establishing this account, and being allowed the same as an offset against the indebtedness of himself to the estate. The auditor found him to be indebted to the estate, for the proceeds of the bonds above mentioned

and interest, to the amount of \$497. He also found, substantially, that an indebtedness from his testator existed in his favor, for moneys advanced and paid out in the lifetime of the latter, in the sum of \$371. Both of these were debts existing before the testator's death, and, assuming that to be the case, there was no reason why the one should not have been allowed to apply against the other, as justice and equity seem to require, so that the actual indebtedness, for which the testator should be charged, would be, in respect to the proceeds of the bonds, the difference between the two amounts. Of course, it would come to the same thing, if, after ascertaining the balance due on the accounting, the surrogate had allowed, as a payment to the executor, the sum due him on his account, set forth in schedule D. Neither of these things was done; and, as it is, the executor, who under the decree is bound to pay out and invest the whole balance found against him, according to certain specific directions, is subjected to the loss of his entire claim against the estate. We think it proper that the error should be corrected by a modification of the decree, so as to allow the sum of \$371, upon which no claim for interest was made by the executor, to apply upon, and be deducted from the sum which the executor is directed to invest, after paying expenses of the accounting.

The decree should be modified, and affirmed as modified, without costs of this appeal to either party.

DANIELS and LAWRENCE, JJ., concurred.

Ordered accordingly.

WILLIAM BOARDMAN, RESPONDENT, v. JOSEPH GAILLARD, JR., AND OTHERS, APPELLANTS.

Insurance — dividends — custom — receipt.

Plaintiff and defendants were joint owners of a steamer, plaintiff owning four-fifths, and defendants one-fifth. The steamer was managed by defendants, and, by them, insured for the benefit of all the owners in several mutual insurance companies, the plaintiff being charged with four-fifths of all the premiums; *held*, that the plaintiff was entitled to receive four-fifths of all scrip or dividends received by the defendants on account of such premiums.

The vessel was subsequently sold, and, after the defendants had received the proceeds of the scrip, the plaintiff received seventy-six dollars and thirty-five cents, as the balance then due him out of the earnings of the vessel, and gave a receipt therefor, which purported to be in full of all demands against the defendants. The plaintiff testified that he did not know, at this time, that anything had been realized from the scrip; *held*, that he was not estopped by the receipt from showing his mistake as to the facts, and that he only intended to give a receipt for the sum of money he actually received.

To render a custom obligatory, it must ordinarily be proved that it was known to the party to be bound thereby.

APPEAL from a judgment, in favor of the plaintiff, entered upon the report of a referee. The action was for an account, in respect to the proceeds of scrip received by defendants on premiums paid on insurance on a steamer, the joint property of plaintiff and defendants, in the Atlantic and other mutual insurance companies.

The plaintiff, at the time he received the seventy-six dollars and thirty-five cents, gave the following receipt:

Received, New York, 12th November, 1867, from Messrs. Aymar & Co., seventy-six dollars and thirty-five cents, to close account, my interest in steamer "Mary A. Boardman," and in full of all demands of mine against Messrs. Aymar & Co.

{ 3 ct. Rev. 41 p }
cancelled.

(Signed)

WILLIAM BOARDMAN.

The other facts in the case appear in the opinion.

George H. Foster, for the appellants, insisted that receipt was in nature of contract, and could not be varied by parol. (*Pierce v. Pierce*, 25 Barb., 243-252; *Palmerton v. Husford*, 4 Den., 166;

Howlett v. Howlett, 56 Barb., 478; *Grocers' Bank v. Fitch*, 1 N. Y. Supreme, 653; *Howard v. Norton*, 65 Barb., 167; *Kock v. Bonitz*, 4 Daly, 117-120; *Joslyn v. Capron*, 64 Barb., 606.) That the account became stated. (*Hutchinson v. Market Bank of Troy*, 48 Barb., 302; *Lockwood v. Thorne*, 11 N. Y., 170.)

E. H. Benn, for the respondent.

DANIELS, J.:

The plaintiff and the defendants, who constituted the firm of Aymar & Co., were the owners of the steamer called *Mary A. Boardman* from the time when she was built, in 1862, until August, 1864, when she was sold. The title was in the defendant, Joseph Gaillard, Jr., as security for advances made by his firm in building her. It was so held for the benefit of the plaintiff and defendants, he owning four-fifths and they the remaining one-fifth; she was managed by the firm of Aymar & Co., in which the plaintiff was not interested; while she was so owned and managed, she was insured by the firm in the Atlantic and Sun Mutual Insurance Companies. These companies transacted their business on what is known as the mutual plan, which was so arranged and carried on as to allow the persons, insured by them, to participate in the profits of the business of the companies. Under that arrangement, the firm received from these companies, for the years 1862, 1863 and 1864, certificates called scrip, entitling them to certain amounts, as their portions of the earnings or the profits of the business done in those years. The insurances, on account of which these certificates were issued and received, were all effected for the benefit of the plaintiff as well as the defendants, and four-fifths of the premiums, paid for them, were charged over by the defendants to him, and allowed by him in the settlement of their accounts; in effect, therefore, four-fifths of their amount resulted from the insurance of his interest in the steamer, and the premiums paid by the firm and reimbursed to it by him. And that proportion of the certificates or scrip, was, for that reason, as much his property as it would have been, if the insurance to that extent, had been effected in his name; if a loss had happened during the continuance of either insurance, no person would deny the plaintiff's right to four

fifths of the entire amount paid in satisfaction of the claim under it, and yet that would be no more directly the result of the premium paid by him for the insurance, than the certificates or scrip issued on account of its proportionate part of the profits or surplus earnings of the company; in reality, the amount returned, by force of the scrip or certificates, is so much more premium paid than the sum for which, under the circumstances afterward occurring, it appears the insurance should have been made; in substance, it is a rebate of the premium paid for the insurance, and it as completely and equitably belongs to the person whose interest, at his expense, is insured, as the money did, which he paid for the purpose of having the insurance made; if he had paid a certain sum to an agent for the purpose of procuring a policy for him upon his interest in the ship, and it had been effected for less than the amount, the difference would, beyond controversy, be the property of the principal, and his rights, in this respect, cannot be changed by the circumstance that the money actually went into the hands of the insurance company, under an implied understanding that the portion, not required to pay the premium earned, should be returned to the person effecting the insurance; so far as the firm of Aymar & Co. acted for the plaintiff in insuring his interest in the steamer, they did so as his agents, and under the well-settled principles applicable to that relation, he was entitled to the benefits, advantages and profits of the act they performed in his behalf.*

There is nothing in the action of the chamber of commerce, as it is shown in the case, in conflict with the existence of this right. The conclusion of the committee, to which the subject was referred, and which was afterward adopted, was, that "the parties here who effect the insurance, are entitled to the stock certificates." In the present case, the plaintiff was the real person who effected the insurance made on his four-fifths of the steamer; it was done for his sole and exclusive protection and benefit, through the action of his agents, and at his expense, and they paid so much more for it than the companies proved entitled to receive, as they agreed to refund by means of the certificates or scrip, issued on account of subsequent surplus profits or earnings.

* *Minnesota R. R. Co. v. Morgan*, 52 Barb., 217.

But as the action of the chamber of commerce, cannot be allowed the effect of law, regarding the rights of parties in legal controversies, it would not change the case, even if the construction already mentioned could not appropriately be given to the conclusion mentioned in the report of the committee; the legal rights of parties to property, cannot be divested or changed by any such action. These rights, in this case, result by operation of law from the relations existing between the parties, and the means through which the insurance upon the plaintiff's interest in the property was effected, and no custom can be allowed, as valid, which would deprive the party, entitled to it, of the protection secured by well-settled legal principles; if it could, the law would be chargeable with the palpable absurdity of providing the means for its own subversion. Beyond that, there was no evidence in the case, which, in any view, could render such a custom, even if it existed, obligatory upon the plaintiff, for he was not shown to have any knowledge of its existence; and proof of such knowledge, or of facts from which it may be fairly inferred, is ordinarily essential to the establishment of a valid custom.*

The proof showed that Aymar & Co., from time to time, rendered accounts to the plaintiff, showing their receipts and disbursements in the management of the steamer, and the premiums paid on the plaintiff's account for insuring his interest; but, as they contained nothing whatever in reference to the certificates or scrip received, they present no obstacle in the way of maintaining the present action for his proportion of their proceeds, even though he failed to object to the accounts and afterward settled them. There was nothing on the face of the accounts rendered, from which he could infer that the firm intended to claim his proportion of such proceeds, and he could not therefore be reasonably expected to object to their omission to credit him with it; besides that, his own evidence as a witness, which was acted on as credible by the referee, was, that he did not know that anything had been realized from the certificates or scrip when the accounts rendered were settled, and if he had, that would not have precluded him from proving a

* *Ripley v. Aetna Insurance Co.*, 30 N. Y., 186, 160; *Duguid v. Edwards*, 50 Barb., 288; *Wadley v. Davis*, 68 id., 500; *Read v. Delaware & H. Canal Co.*, 3 Lansing, 313; *Higgins v. Moore*, 34 N. Y., 417.

mistake or misapprehension as to the facts, on his part, as to that subject.* The proof in this case was sufficient to bring the plaintiff's claim within the rule supported by these authorities.

And after these accounts had been rendered and settled, and after the proceeds of the certificates or scrip had been received by the firm of Aymar & Co., the plaintiff received seventy-six dollars and thirty-five cents, as the balance then due him out of the earnings and management of the steamer; the receipt then given by him, declared the amount paid to close the account of his interest in the steamer *Mary A. Boardman*, and to be in full of all demands against Aymar & Co.

At the time when that payment was made, the plaintiff testified that no settlement was made, and that all which was designed to be receipted for, was the amount of money he received; that he did not read the receipt, and could not do so without his glasses; when, on the other hand, the clerk of the firm, who made the payment and took the receipt, testified that it was paid as the last amount the plaintiff was entitled to, on account of his interest in the steamer. Under this state of the evidence, the question, whether the amount paid was received in full by the plaintiff, was one of fact, and as the referee has found upon it against the defendants, his conclusion must be adopted as final, for no such preponderance existed upon the subject, either way, as would justify this court in holding that conclusion to be erroneous.

It must be assumed, in conformity with this finding, that the amount paid was simply received as so much then appearing to be due to the plaintiff from the defendants, having no effect whatever upon any other legal demand which might be shown to exist against them in his favor; accordingly, there was nothing in what then transpired, which should prevent the plaintiff from maintaining his present demand, and the statement in the receipt, subscribed by him, that he received the amount paid, in full, did not exclude proof showing that such was not the fact; what the receipt contained on this subject, was, in no just sense, a contract; it was a simple declaration, at the most, that the amount paid was received in full of all demands, and that has always been liable to explana-

* *Hutchinson v. Market Bank of Troy*, 48 Barb., 802, 824; *McIntyre v. Warren* 3 Keyes, 183.

tion and contradiction, where it may be shown to be inconsistent with the truth and the settled rights of either party to the controversy involving it.* The referee found that certificates or scrip were received by Aymar & Co., on account of the insurance of the steamer in the Sun Mutual Ins. Co., to the amount of \$2,520; but the evidence of the secretary, who was sworn and examined as a witness on the plaintiff's behalf, showed that it was all canceled without anything being paid upon it by the company; the only profit, which the firm derived from it, was secured by means of its sale, made in April, 1866, at a discount ranging from twenty, to thirty-seven per cent. This large discount was not made good by the interest of six per cent, and the dividend of one and one-half per cent which the company paid upon it; neither did those payments, and the excess in the gross amount of the certificates or scrip received over the amount allowed by the referee, so far increase the proceeds, as to equal the amount allowed for them by the learned referee. What that precise amount should be, under the evidence, it is not necessary to determine; for the defendants, by their answer, have admitted that they received scrip from both the insurance companies insuring the steamer, on which they realized the sum of \$8,788.69, and that, certainly, is as much as the evidence warranted the referee in concluding that they had received; four-fifths of that, amounting to the sum of \$7,030.92, the plaintiff was certainly entitled to recover, which is \$42.66 less than the amount allowed him. As the defendants, upon their own admission, are liable under the evidence relating to the other subjects, considered to this extent, there can be no necessity for examining the objections taken during the trial, as to the exclusion or admission of evidence; neither can it be proper to consider the vast multitude of exceptions taken by the defendants to the referee's refusal to find on the specific matters submitted to him, for no question can be presented by exceptions of that description.† The only error in the case, at all prejudicial to the defendants, is that relating to the amount allowed, and to correct that, the judgment should be reversed, and a new trial ordered, with costs to abide the event, unless the plaintiff, within twenty days after notice of the

* Ryan v. Ward, 48 N. Y., 204.

† Rogers v. Wheeler, 52 N. Y., 202.

decision, stipulate to deduct forty-two dollars sixty-six cents, with interest from the 16th of April, 1866, from the amount of the judgment. In the event of making such stipulation, the judgment, as so reduced, should be affirmed, without cost of this appeal to either party.

DAVIS, P. J., and LAWRENCE, J., concurred.

Ordered accordingly.

GEORGE E. HOLYOKE AND ANOTHER, RESPONDENTS, v.
SAMUEL ADAMS AND ALFRED RICHARDS, APPELLANTS.

Discharge in bankruptcy — when not allowed to be set up in supplemental answer — attachment.

In an action commenced against the defendants, who were non-residents, an attachment was issued, to procure the dissolution of which, an undertaking, with sureties, was given. Some two years after the commencement of the action, and while it was pending before a referee, the defendants commenced proceedings in bankruptcy, and, having procured their discharges, applied to the court for leave to file a supplemental answer, setting up the discharges, so procured, as a defense to the suit. The court, at Special Term, refused to allow them to do so. *Held*, that this was proper.

APPEAL from an order made at the Special Term, denying a motion made by the defendants for leave to file a supplemental answer, setting up their discharges in bankruptcy, obtained subsequent to the commencement of the action.

This action was commenced in 1869, and, the defendants being non-residents, an attachment was issued against their property, to procure the dissolution of which, an undertaking, with sureties, was given. The case, being at issue, was referred to Hon. W. H. Leonard, to hear and determine. During the pendency of the action, and in the month of October, 1872, the defendants were severally adjudged bankrupts by the District Court of the United States, for the District of Massachusetts. In January, 1873, a motion was made, in behalf of the defendants, at Special Term at chambers, founded upon said proceedings in bankruptcy, for a stay of all proceedings in this action, pending the application by defendants for their

discharge, which motion was denied so far as to allow plaintiffs to proceed to judgment in the action. From this order, the defendants appealed to the General Term of this court, where the order was affirmed, the following opinion being delivered by BRADY, J.:

BRADY, J.:

In this case, the proceedings in bankruptcy were not commenced within four months after attachment was granted, and the attachment, if it had been continued, would not, therefore, have been dissolved by operation of the bankrupt law. The fourteenth section declares only that attachments, made within four months next preceding the commencement of such proceedings, shall be dissolved. The result of the attachment is a vested right, which is to have the property seized, applied to the extinguishment of the debt; subject, however, to the right of the debtor to substitute an undertaking prescribed by law. The plaintiff, by attaching property, acquires a specific lien upon the debtor's interest, and is entitled, like a judgment creditor, to impeach the colorable title of a fraudulent mortgage.*

The execution and delivery of such an undertaking to release the property, should be held, in legal contemplation, to be a part, and in continuation of the attachment proceedings. The propriety of this is apparent from the obligation assumed by the sureties, which is, to pay any judgment that may be recovered in the action, the sureties thus agreeing to do exactly what the property seized would do when applied, namely, pay the judgment obtained; and also from the presumption that the property levied upon, would have remained in *statu quo* until the judgment was recovered, if the undertaking had not been given. The application of this principle, in this case, would protect the plaintiff from the intervention of a power, by which he might otherwise be deprived of a substantial right, acquired by superior diligence, under the laws of the State.

The character of the undertaking, its subject, office and purpose, however, leave no doubt that it is a substitute for the levy under the attachment, which is in effect continued, although the process is discharged. There is another view of this question which may be stated thus: The undertaking having been given, the sureties

* *Rinchey v. Stryker*, 26 How., 75.

assumed the payment of the debt alleged when established by process of law, and they became the debtors of the plaintiff, on condition that the demand was proven and judgment for it obtained. This obligation rests upon, and the consideration is, the delivery of the property seized, a delivery predicated entirely of their promise to pay the claim, for the discharge of which the property released, was seized. Their liability, therefore, depends upon whether the debtor, at the time of the giving of the undertaking, was lawfully indebted to the plaintiffs, and, to ascertain that, the judgment must be recovered; for such, as already suggested, is the condition of the obligation assumed by them. If this view be correct, it is immaterial whether the debtor has been discharged from his indebtedness or not, by subsequent proceedings. Such a result would not affect the liability of the sureties whose undertaking related to an existing liability, which, as soon as determined, made their promise absolute. For these reasons, in addition to those already given, the order of the Special Term should be affirmed.

This appeal is thus disposed of, without considering whether the fourteenth section of the bankrupt act is constitutional; whether, when the jurisdiction of a State court has been invoked and rights have been secured under it, they can be taken away by proceedings in another court, under the provisions of the Constitution of the United States. It might not be difficult to solve this problem, although it has been held, in proceedings in bankruptcy, that congress has the power, by operation of a general bankrupt law, to divest the conditional lien, acquired by levy of an attachment.* We have examined, but do not feel bound to follow, the cases cited on the argument which were decided in the courts of Massachusetts.

In the month of September, 1873, the defendant, Adams, and in January, 1874, the defendant, Richards, were severally discharged, in said bankruptcy proceedings, from all their debts and claims, provable against their estates in October, 1872.

On the 9th of January, 1874, a motion was made in behalf of the defendants, for leave to file a supplemental answer, setting up

* Bump on Bankruptcy (5th ed.), 329, and cases cited.

their discharge in bankruptcy, and, the motion having been denied, this appeal was taken.

E. Cooke, for the appellants.

Edward D. McCarthy, for the respondents.

DAVIS, P. J.:

The motion in the court below, was for leave to file a supplemental answer, setting up the defendant's discharge in bankruptcy.

The suit was commenced in 1869. The property of the defendants in this State, was attached in due form at that time, they being non-residents. An undertaking was given, with sureties, on the dissolution of the attachment. Some two years afterward, while the action was pending upon a reference, the defendants commenced proceedings in bankruptcy, which have resulted in the discharges now sought to be pleaded. When this case was before this court, on appeal from an order refusing a perpetual stay of proceedings in the action, this court held, as appears by the MS. opinion of BRADY, J., that by the attachment, the plaintiffs acquired a lien upon the property attached, for the payment of the recovery that might be had in the action. That the proceedings in bankruptcy, not having been commenced within four months after the levying of the attachment, did not operate to dissolve the attachment. That the plaintiffs, therefore, had "a vested right," by force of the attachment, "to have the property seized, applied to the extinguishment of the debt; subject, however, to the right of the debtor to substitute an undertaking prescribed by law." And that the execution and delivery of such an undertaking to release the property, should be held, in legal contemplation, to be a part of, and in continuation of, the attachment proceedings; and that the same is a substitute for the levy made under the attachment, which is in effect continued, although the process is discharged.

We think these rulings necessarily dispose of all the questions involved in this motion; and if we had doubts of their correctness, we should still feel bound to follow them as a direct adjudication of the court upon the question presented. We are, however,

satisfied of their soundness, notwithstanding the contrary ruling in *Carpenter v. Turrell*,* which was not overlooked by the court on its former decision.

Without entering into any general discussion of the questions, we think the order appealed from should be affirmed, with costs.

DANIELS, J., concurred.

Order affirmed, with costs.

ALFRED GREENWOOD AND HARRY ALDRIDGE,
RESPONDENTS, v. MARY A. BRINK, APPELLANT.

Partnership—profits—participation in—& Co.—chapter 281 of 1833.

Participation in the profits of a firm, unless enjoyed under an express agreement that it is given in lieu of compensation for services, and that it gives no interest in the business, makes a man a partner.

Under chapter 281 of Laws of 1833, which makes it a penal offense to assume a copartnership name where no partnership exists, it is a sufficient answer to show that the firm name actually represents persons, who are liable as partners to third persons and creditors.

APPEAL from a judgment of the Supreme Court, in favor of plaintiff, for ninety-three dollars and seventy-five cents and costs. The action was brought to recover the value of goods sold to defendant. The answer alleges that the plaintiff, Greenwood, was doing business under the firm name of Alfred Greenwood & Co., and that in fact he had no partner, and that the designation "& Co.," did not represent any partner; that, in so doing, Greenwood violated chapter 281, of the Laws of 1833. The defendant, Harry Aldridge, claimed a one-half interest in the claim, by assignment from Greenwood. The plaintiff demurred. The demurrer was overruled, with leave to reply. The plaintiff served a reply, but did not formally withdraw the demurrer. On the trial, the judge charged, "that participation in the profits makes a man a partner, and it is not necessary that they should say anything about the losses."

"It is possible, however, for a firm to employ clerks and give

*100 Mass., 450.

them, as a compensation for their services, a certain amount of the profits; but it must be distinctly understood between the parties that that is as compensation, and that they have no interest in the business whatever."

E. H. Benn, for the appellant. The answer that the goods were sold contrary to law, was a good defense. (43 How., 176; 29 id., 489.) The demurrer, not having been withdrawn, admitted the allegations of the answer. (*Cutler v. Wright*, 22 N. Y., 472, 482.) No partnership existed in this case. (*Baldwin v. Burrows*, 47 N. Y., 199; *Pattison v. Blanchard*, 5 id., 186; *Burckle v. Eckhart*, 3 id., 132; *Vanderburgh v. Hull*, 20 Wend., 71; *Clark v. Gilbert*, 32 Barb., 581; *Conklin v. Barton*, 43 id., 435; *Man. Brass Manufacturing Co. v. Sears*, 45 N. Y., 797.)

C. J. G. Hall, for the respondent. The receipt of the reply was an election to accept that plea from the plaintiff. (*Munn v. Barnum*, 12 How., 563; *Spelman v. Weider*, 5 id., 5.) To constitute partnership, an agreement to share in losses is not necessary. (*Manhattan Brass Manuf. Co. v. Sears*, 45 N. Y., 797; *Leggett v. Henneberger*, 1 N. Y. Supreme Ct. Rep., 418.)

DAVIS, P. J.:

The demurrer to the answer having been overruled by the court, and leave given to reply on payment of costs of the demurrer, and the plaintiffs having served a reply and paid the costs, the demurrer must be regarded as abandoned, although not formally withdrawn.* A reply, having been expressly permitted by the order of the court, was proper, and formed part of the record.† The order, on the overruling of the demurrer, was obtained on defendant's motion, and the provision requiring a reply and payment of costs, must be deemed to be granted on his motion. The record, therefore, properly before the court on the trial, was the complaint, answer and reply, and the issue to be tried arose upon the answer and reply. The answer admitted all the material allegations of the complaint, and entitled plaintiffs to judgment for the goods sold,

* *Brown v. The Saratoga R. R. Co.*, 18 N. Y., 495; *Cutler v. Wright*, 22 N. Y., 472, per SELDEN, J., p. 483.

† Code of Procedure, § 153.

unless the defendant should affirmatively establish that the goods were sold to her by Greenwood, in a firm name, in violation of the statute, when, in fact, there was no firm at the time of the sale. On that issue, evidence was given to the jury on both sides, and the jury found adversely to the defendant.

The only question in the case, is whether the court was correct in charging the jury that "participation in the profits" (of a firm) "makes a man a partner, and it is not necessary that they should say anything about losses." The court accompanied this charge with the explanation that it is competent for a party or firm to employ clerks, and give them, as a compensation for services, a certain amount of profit, but it must be distinctly understood between the parties that it is as compensation, and that they have no interest in the business whatever, and he left it to the jury to say whether the arrangement between Greenwood and Aldridge, gave the latter an interest in the business, or a share in the profits as a partner, or whether Aldridge was to receive a share in the profits as compensation merely. I do not think there was any error in this ruling. Both of the plaintiffs testified, substantially, that Aldridge was a partner, with the understanding that he should put in his services and be interested in the business, and have one-fifth of the profits, over and above losses, for his share. They assumed a firm name, and carried on business in such name, Aldridge representing the "& Co." Upon their testimony, they would not be permitted to say they were not partners as to third persons and creditors, whatever the law might hold as between themselves. And I think it is a sufficient answer, under the statute making a penal offense to assume a copartnership name where no partnership exists, to show that the firm name actually represented persons, who were liable as partners to third persons and creditors.

It is well settled, by the law merchant, that a participation in the uncertain profits of trade, as a return of capital advanced, constitutes such participator a partner in the concern in which the capital is invested, and makes him liable to third persons, although he is to receive back his whole capital and interest, without deduction for losses or liabilities, as between himself and partners.* One who

* Oakley v. Aspinwall, 3 Sand., 7; Waugh v. Carver, 3 H. Blk., 285; 1 Smith Lead. Cas., 491; Dob v. Halsey, 16 John., 34.

takes a share of the profits, *as such*, of a trading firm, becomes a partner as to third persons, on the ground that those profits form a portion of the fund, upon which creditors have a right to rely for payment.* The modifications of the rule, in this State, require that the servant, compensated by a share of profits, shall have no community of interest in the capital stock of the concern, and shall not, by any arrangement, be deemed a partner as between himself and the members of the firm, and shall not suffer his name to be used as a partner, nor be the person represented by the & Co.;† in short, he must not hold himself out, in form or in fact, as a partner; otherwise he falls within another rule.‡

The issue tendered by the answer, having been disposed of favorably to plaintiffs, they were entitled to a verdict, because no issue had been taken on the allegations of the complaint. The plaintiff might have failed in the action if the defendant had denied the allegation of the complaint, for some of those allegations were disproved (to wit, the sale by Greenwood alone) by the proof of partnership, and, unless the court had permitted an amendment, the defendant would have succeeded on such an issue.

There was no issue to which to apply the variance between the proofs given to defeat the allegations of the answer and the averments of the complaint, and the only issue in the case being disposed of against the defendant, it follows that the judgment must be affirmed.

LAWRENCE and DANIELS, JJ., concurred.

Judgment affirmed.

The recent English decisions upon this question, hold that a participation in the profits of a trade or business, even when it is not shown to be simply as compensation to an employee, is not conclusive evidence of a partnership, and, that whether that relation does or does not exist, must be determined by the contract between the parties. (*Cox v. Hickman*, 8 H. L. Cas., p. 267; *Molloy v. The Cour of Wards*, L. R., 4. Privy C., p. 419; *Bullen v. Sharp*, L. R., 1 C. P., p. 86.)—[REP.]

* *Pott v. Eytor*, 8 Man., Grang. and Scott, 81; *Id.*, 641.

† *Burckle v. Eckhardt*, 8 N. Y., 183; 45 *id.*, 797.

‡ *Burns v. Rowland*, 40 Barb., 868; *Parker v. Barker*, 1 Brod. & Bing., 9.

CARLOS CHAMBERLAIN AND OTHERS, APPELLANTS, v.
DAVID A. LINDSAY AND WILLIAM G. CHITTICK,
RESPONDENTS.

New trial—when granted on grounds of surprise and newly-discovered evidence.

This action was brought to recover for debts contracted and payable in England. The defense was that a composition deed had been executed by the debtors, and assented to and approved by the requisite number and amount of their creditors, which, by the terms of the English bankrupt laws, discharged them from their debts, upon compliance with the terms and provisions of the law, under which it was entered into; one of which was that the deed should be left to be registered, within twenty-eight days from the date of its execution. The deed was executed by the defendant, Chittick, personally, and by Lindsey, by Kerr, his attorney. It was dated December 8, and registered December 30. The defendant, Chittick, was examined before trial and testified that he left England November 27, thus showing that he could not have executed the deed on December 8. At the trial, the plaintiff claimed the deed to be invalid, as it appeared that it was not registered within twenty-eight days of its execution. *Held*, that upon these facts, *alone*, a new trial should not be granted on the ground of surprise, as defendants' attorney might, by a reasonable degree of diligence, have discovered the discrepancy between the date of the deed and the time of the defendant Chittick's departure from England, and have introduced evidence to explain it.

Before the trial, to a question, put by one of the defendants' counsel, as to what they relied on in opposition to the deed, or what their point in the case was, one of the plaintiff's counsel replied by asking, "What effect do you suppose the English bankruptcy law has on American debtors?" And, again, when an application was made by defendants, to dismiss the case from the short-cause calendar, one of the plaintiff's counsel stated, "that he believed the case would turn only on questions of law, and that the facts were not in dispute." *Held*, that the effect of this conduct was to mislead the defendants' counsel and induce him to believe that the legal effect, alone, of the proceedings was to be the subject of contest, and that no formal omissions existed in the documents relied upon, and that a new trial was properly granted upon the ground of surprise.

APPEAL from an order made at the Special Term, granting a new trial on the grounds of surprise and newly-discovered evidence.

This action was brought by the plaintiffs, merchants at Manchester, England, to recover from the defendants, the sum of \$1,283 in gold, on two acceptances given by the defendants to plaintiffs at Manchester, and payable in London, and a balance due for goods sold the defendants by the plaintiffs, in England.

The answer admitted the acceptance and the sale of the goods, and set up that the defendants were discharged by virtue of a certain composition deed made with their creditors, pursuant to the English bankruptcy law. Pursuant to a stipulation signed by the plaintiffs' attorney, the English statutes relative to bankruptcy proceedings and the composition deed were read in evidence. The deed was executed for Lindsay, by John Kerr, his attorney, and by the defendant, Chittick, personally. It was dated December 3, 1869, and registered on the 30th day of December.

The deposition of the defendant, Chittick, taken before the trial, was read in evidence, from which it appeared that he was not in England from the 27th day of November, 1869, until September, 1870. The plaintiffs moved the court to direct a verdict in their favor, on the grounds: 1st. That the bankrupt act of Great Britain had no extra-territorial force. 2d. That the deed was not properly attested as to the defendant, Lindsay, the power of attorney having been executed in New York, and not before an attorney or solicitor, as prescribed by the act; and 3d. That the deed was not registered within twenty-eight days from the date of its execution. The motion was granted, and a verdict directed in favor of the plaintiffs for \$14,217.78. Defendants' counsel then moved for a new trial on the grounds of surprise and newly-discovered evidence, claiming that they were induced to believe, by the stipulations of the plaintiffs' counsel, and from statements made by him, that there was no disputed question of fact, and that the only contest on the trial, would be as to the legal effect of the proceedings; that, on a new trial, they would prove that when the deed was executed by the defendant, Chittick, it was delivered *in escrow*, to be held until it was executed by Kerr, the attorney of Lindsay, and that it was not executed by him until the 11th of December. The motion was granted, and, from the order directing a new trial, the plaintiffs appealed. All the facts appear in the opinion.

Wm. F. Shepard, of counsel for the appellants, claimed that the defendants' counsel had been negligent, and a new trial should not be granted. (*The People v. Marks*, 10 How., 261; *Best v. Starks*, 24 id., 58; *Fellows v. Emperor*, 13 Barb., 92-105; *Lawrence v. Ely*, 38 N. Y., 42; *Jacobs v. Morange*, 47 id., 59.) That the deed

was void, because it was not registered within the time required by the statute. (*Re Skinner*, 11 Law Times, N. S., 354; 13 Weekly Rep., 114; 10 Juris., N. S., 1137; 34 Law Jour., 9; *Re Power*, 11 Jur., N. S., 985; 13 Law Times, 451.) That even if the deed were delivered *in escrow*, it was *executed* when it was signed and sealed by Chittick, and the twenty-eight days commenced to run from that time. (*Perryman's Case*, 5 Coke, 846; *Coare v. Giblett*, 4 East, 85-94; *Graham v. Graham*, 1 Vesey, Jr., 272; *Hunter v. Hunter*, 17 Barb., 28; *Austin v. Hall*, 13 John., 286; *Wheelright v. Wheelright*, 2 Mass., 447; *Hatch v. Hatch*, 9 Mass., 307; *Hatha-way v. Paine*, 34 N. Y., 92; *Tooley v. Dibble*, 2 Hill, 641.)

John E. Burril, for the respondents, claimed that the twenty eight days, provided for the registration of the deed, did not run until the deed had been executed by all the parties; that the motion for a new trial was addressed to the discretion of the court below. (*Seeley v. Chittenden*, 10 Barb., 303; *Lawrence v. Ely*, 38 N. Y., 42; *Platt v. Munroe*, 34 Barb., 291; *Tyler v. Hoornbeck*, 48 Barb., 197; *Hoppeck v. Stone*, 49 id., 524.)

DANIELS, J.:

According to the notice of the motion, on which the order appealed from was made, the application for a new trial was restricted to the grounds of surprise and newly discovered evidence; for, although it was afterwards added that the motion would also be made on other grounds stated, no mention of them was made in the notice.

The court, at the Special Term, appears to have taken that view of the application; for, by the terms of the order, it was the motion for a new trial on the grounds of surprise and newly-discovered evidence, which was granted. The merits of the case are, therefore, not strictly before the court on the present appeal, farther than their consideration may prove incidental in the examination of the reasons existing for the support of the order. Both parties to the action were admitted to be British-born subjects. The plaintiffs were engaged in business as merchants in Manchester, England, and, during November and December, 1869, the defendants were engaged as merchants, carrying on business in New York and in England. The debts in controversy were contracted and payable

in England. Upon this state of facts, the parties, as to the transactions involved in this action, were subject to the laws of that country, so far as proceedings affecting the demands were taken there.*

During the latter part of the year 1869, a composition deed was executed by the debtors, and assented to and approved by the requisite number and amount of their creditors, which, by the terms of the English bankrupt laws then in force, effected their discharge from their debts, upon compliance with the terms and provisions of the law under which it was entered into.

These terms and provisions appeared to have been all complied with, excepting the one requiring the deed to be produced and left at the office of the chief registrar, for the purpose of being registered, within twenty-eight days from the date of its execution by the debtor. Whether that was done within the time prescribed, was apparently the point on which the cause was finally disposed of at the trial. For as the deed could be, and was, executed by one of the debtors by means of a power of attorney, that cannot be regarded as a defect in the defendants' defense, on which they could have been properly or probably defeated.†

The deed itself was dated on the 3d of December, 1869, and it was registered, as the law required it to be, on the thirtieth of that month. So that, on the face of the paper, the law seemed to have been literally complied with in that respect. But before the trial took place, the debtor, who in person executed the deed, was examined as a witness in the case at the instance of the plaintiffs, and, without his attention being in any manner directed to the precise time when the deed was executed, testified that he left England for New York on the 27th day of November, 1869. This circumstance rendered it at once apparent that he could not have executed the deed on the third day of December, the day of its date, but must have done it on or before the twenty-seventh of November. No inquiry was made for an explanation of this circumstance, nor was the attention of the witness, in any manner, directed to its existence, and the fact itself seems to have escaped the observation of the defendants' attorney and counsel. It plainly might have been

* 2 Kent's Com., 459, marg. paging; Story's Conflict of Laws, §§ 335, 338, 340

† Re Fulcher, 1 Chancery Appeal Cases, 519.

discovered by a reasonable degree of attention to the evidence given by the witness, in view of the date appearing upon the face of the deed. And for that reason; if the application had proceeded solely upon that ground, the omission to devote that degree of attention to the case, before the trial was brought on, would have formed a complete answer to it.

Parties to legal proceedings, are required to use attention and diligence in the proper preparation of their causes for trial; and if either fails to do that, and, consequently, is defeated when he might otherwise have succeeded, the fault is his own, for which the courts can ordinarily supply no remedy. But it is claimed, by the defendants' attorneys and counsel, that they were prevented from discovering this discrepancy between the statements of the witness and the date of the deed, by assurances received from the plaintiffs' counsel, which induced them to anticipate an entirely different objection to the defense made under the composition deed. And sufficient reason is disclosed by the affidavits used upon the application, to warrant the conclusion that such was the case. It is not supposed that the plaintiffs' counsel really designed to deceive the attorney for the defendants with whom their interviews were held. But it is quite apparent that they designed to respond to his inquiries, as to the position they intended to take by way of answer to the defense, in such a manner as would not be likely to disclose the real defect they had then discovered to exist. They had the undoubted right not to respond at all, for it was no part of their duty to disclose the precise course which they designed to take in the trial of the cause, or the reason on which they would endeavor to recover a verdict for the indebtedness sued upon. But when they waived that, and undertook to respond to the inquiries made, it should have been done in such a manner, as not to leave a palpably erroneous impression on the mind of the person making them.

When the stipulation was made, agreeing upon certain evidence to be given on the trial, one of the attorneys for the defendants, inquired of one of the plaintiffs' counsel what they relied on in opposition to the deed, or what their point was in the case. And the reply was made by asking the question, "What effect do you suppose the English bankruptcy law has on American debtors?"

The ordinary effect of such an interview, would be to produce the conclusion, that the legal effect, alone, of the proceedings under the bankrupt law, was to be rendered the subject of contest at the trial.

It was calculated to lure the attorney, particularly if he was apt to be confiding as to his adversary's statements, into the belief that no formal omissions existed in the documents relied upon by the defendants as their defense. And it was not unreasonable that the trial should be undertaken with that expectation existing on the part of the defendants. The natural course to be taken, would be to prepare and fortify the defense, so far as that objection required it to be done, and devote no particular attention to it in other respects.

Upon another occasion, preceding the trial, when an application was made by the defendants' counsel, to dismiss the case from the calendar of short causes, one of the plaintiffs' counsel stated, by way of answer to it, "that he believed the case would turn only on questions of law, and that the facts were not in dispute." And yet the fact required for the proper presentation of the questions of law, which was found to be controlling in the case, was one which did require to be proved, and it was proved by the deposition of one of the defendants.

The trial was opened, and proceeded in such a manner as to indicate the existence of care in avoiding all disturbance of the conviction abiding in the minds of the defendants' attorneys. And it was not until the case was in a condition to be finally disposed of, that their minds were enlightened upon the real point in controversy in the action. Then they asked leave to have a juror withdrawn, for the trial to stand over until further preparation could be made to meet the plaintiffs' objection, but that was refused on account of a supposed want of authority to conform to that request. The case was adroitly managed by the counsel for the plaintiffs, and their conduct might deserve the admiration of observers, were it not for the possibly disastrous effects resulting from it to the defendants.

It is the duty of courts of justice, to secure the trial and disposition of legal controversies appearing before them, in conformity to the legal rights of the parties, so far as that may be practically done; and the sanction of the ingenious devices made use of in the

present case, which probably misled the defendants' attorneys and counsel to their prejudice, would plainly violate that obvious duty. While parties and their counsel are not obliged to inform those opposed to them, what their precise course of action may be upon the trial, they certainly are obliged to avoid saying and doing what may have a direct tendency to mislead them. And if they do not, and gain an advantage by means of an erroneous impression, voluntarily produced for the purpose of affording an opportunity to secure it, the court is bound to deprive them of it, where that appears to be required to promote and attain the ends of justice.

The defendants showed, in support of their application, that they could prove that the deed was delivered in *escrow* at the time when it was executed by the first debtor, and so remained until after the 3d of December, 1869, which they insist will answer the statutory requirement that it should be left for registry within twenty-eight days after its execution. The solicitor, whose affidavit was produced in support of the defendants' motion, stated that the deed would only take effect, as an executed instrument, from the time when the event happened on which it was held in *escrow*, while three other eminent English barristers, among whom is the present lord chancellor, have concurred in a different opinion.

Under ordinary circumstances, this preponderance against the defendants would properly lead to a denial of their motion. For there would be plausible ground, at least, for concluding that another trial could not change the result. But there is, after all, a probability that the defendants' solicitor may prove to be right in his views, notwithstanding the authority opposed to him. And as long as it is the duty of the court to withhold encouragement from the course of practice which prevented the defendants from presenting the point at the trial, that probability is sufficient to justify an affirmance of the order; * particularly, as the point in dispute can be more effectually examined and decided upon evidence taken on notice, than *ex parte* affidavits. And there is room for doubt as to whether the requirement of the statute was not too literally construed against the defendants. Whether it was or not, it is not necessary or proper to decide at this time.

*Tyler v. Hoornbeck, 48 Barb., 197.

FIRST DEPARTMENT, MAY TERM, 1874.

It is sufficient that a fair administration of justice appears to require that the defendants should be afforded an opportunity for securing a decision of the point on which they now rely for the success of their defense, and which they were deprived of by the statements and conduct of the plaintiffs' counsel.

The order appealed from, should be affirmed, with costs to abide the final result of the action.

DAVIS, P. J., and WESTBROOK, J., concurred.

Order affirmed, with costs to abide the event.

WILLIAM C. DE HART, APPELLANT, v. RUFUS HATCH
(T. T. JOHNSON, A WITNESS, RESPONDENT).

Referee — when appointed to take affidavit to be used on motion — ex parte motions.

A referee will not be appointed to take the affidavit or deposition of any person, to be used upon an *ex parte* motion.

APPEAL from an order vacating an order appointing a referee to take the testimony of T. T. Johnson, to be used on a motion, to be made by the plaintiff, for the arrest of the defendant.,

O. P. Buel, for the appellant.

Henry S. Bennett, for the respondent.

DANIELS, J.:

The application, which was denied by the order appealed from, was for an order requiring the respondent to appear and make an affidavit to be used by the plaintiff in procuring an order to hold the defendant to bail in an action of slander. When an order of arrest is obtained, it must be procured from a judge of the court in which the action is brought, or from a county judge. And the application to be made for it, is entirely *ex parte* in its character.

No hearing of the parties is required or provided for, upon such an application. But the judge is required to make the order, when the case is shown to be one of those mentioned in section 179, and it appears by the affidavit produced, that a sufficient cause of action exists and a proper undertaking is presented.* The application for such an order is, however, a motion, as that term is generally defined by chapter 8 of the Code of Procedure. But while it is called a motion, it is still one of a very informal character. This chapter contains provisions relating to motions made for *ex parte* orders, including orders of arrest. It also contains provisions relating to motions on notice, more properly known as such, as the term was used before the Code, and to a very great extent has been used since that time. Motions of this description, are often important in the interests they affect, and the points on which they are decided. And it is to furnish evidence for their proper disposition that the provision was enacted, by which persons may be compelled to supply their affidavits to the party making or opposing them, after they have refused to make them voluntarily. This provision has no application to a motion made before a judge for a mere *ex parte* order. It is confined in terms to motions made in a court of record, as distinguished from applications to a judge. The order requiring the affidavit to be made, can only be obtained when the party applying for it, intends to make or oppose a motion in a "court of record." These are the terms used to define the cases in which the order is allowed to be made.† And they do not include an application made for an *ex parte* order to a judge, for that is not a motion made in a court of record. The affidavit presented for the order to examine the witness in the present instance, did not show a case within the import of these terms. For that reason, the order appealed from was properly made, and it should be affirmed, with costs.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed, with costs.

* Code, §§ 180, 181, 182.

† Code, § 401, sub. 7.

JEANNETTE G. SHEPHERD, RESPONDENT, v. THOMAS C. SHEPHERD, APPELLANT.

Alimony — not affected by subsequent remarriage of wife — divorce.

Where, upon a divorce obtained by the wife, on the ground of the husband's adultery, the decree requires him to pay her a certain sum of money, annually, for her support, this allowance is not affected by her subsequent remarriage, nor should it be reduced on that account.

APPEAL from an order refusing to modify the decree in this case, as to alimony.

Judgment of divorce was entered in favor of the plaintiff against the defendant, on the ground of his adultery, September 5th, 1871, and, by the decree, he was directed to pay the sum of \$3,000 a year to the plaintiff for her support.

Since the judgment, the plaintiff has remarried, her husband having an income of \$2,500. Before marrying the defendant, the plaintiff had obtained a divorce from a prior husband, and she derives an income, by reason of that marriage, of \$672.50.

After the marriage of the plaintiff, the defendant moved to modify the decree by striking out the provisions as to alimony, or by reducing the amount. The referee, to whom the case was referred to report the facts and his opinion, reported that the marriage of the plaintiff did not entitle the defendant to be relieved from the payment of the alimony, and that no sufficient reason was shown for the reduction of the amount.

Exceptions were filed by the defendant, and a motion made to overrule the report and grant the original motion, and from the order denying this motion, defendant appealed.

Wm. F. Shepard, for the appellant.

C. W. Sandford, for the respondent.

DANIELS, J.:

The statute empowers the court, upon making a decree in favor of the wife, dissolving the marriage for the misconduct of the hus-

band, to require him to provide such suitable allowance for her support as it shall deem just, having regard to the circumstances of the respective parties. And the continuance of that allowance is in no way rendered dependent on the fact that she shall not afterwards marry again. It is liable to no such contingency.* Beyond that, the statute expressly secures to the wife the right to marry again where she is the innocent party to the decree. And it neither expressly, nor by any reasonable implication, deprives her of her allowance by way of alimony for so doing.† Complete control is given the court over the subject of the amount, but that is in no sense rendered dependent upon the circumstance of her subsequent marriage. And as long as that is the nature of the provision made upon this subject, the court is not authorized to add a further qualification, for which no warrant has been supplied by the law. The remedy is entirely statutory in its nature, and must be governed by the import and spirit of the legislation enacted upon the subject. And, as it has not been provided that the wife shall forfeit her alimony by afterwards marrying, the court has no right to attach that as a penalty to the act.

In *Forrest v. Forrest*, ‡ the husband was not allowed to prove the subsequent misconduct of the wife, for the purpose of depriving her of her alimony on that account. The reason of the rule, applied in the disposition of that case, would seem to maintain the conclusion that an act, approved of by both law and morals, should not be attended with a loss which was there denied to be a proper or lawful consequence of her subsequent misbehavior. The proofs show that she is dependent upon the provision made for her support by the decree, and it is not claimed that any change has occurred in the circumstances of the husband, rendering him unable to supply it. For that reason, no cause exists for any reduction or modification in the allowance. And, as the wife's marriage forms no good ground for depriving her of the provision made by the decree for her support, the husband should not be relieved from its performance. In one sense, it was a punishment justly imposed upon him for the violation of his marital obligations; and that reason exists with as much force at this time, for its continuance,

* 3 R. S., 5th ed., 236, § 58. † Id., 237, § 62. ‡ 25 N. Y., 501, 514-516.

as it did when the decree itself was pronounced against him. For these reasons, as well as those mentioned by Justice DONOHUE, in his opinion, the order made should be affirmed, with costs.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed, with costs.

HENRY JACOBY, RESPONDENT, v. DAVID JOHNSTON AND
ANOTHER, APPELLANTS.

*Submission to arbitration—when it operates as a discontinuance of an action—
stay of proceedings.*

After the commencement of this action, an agreement, under seal, was entered into by all the parties thereto, to "submit all matters involved in said action, and presented by the pleadings therein, to the hearing, determination and decision of three arbitrators," and "that the action in the Supreme Court aforesaid, and all proceedings therein, or in relation thereto, shall be stayed pending the award of said arbitrators;" *held*, that the submission would have effected a discontinuance of the action but for the clause providing for a stay of proceedings; that this operated as a perpetual stay until the making of the award, which would at once effect a final discontinuance of the action.

APPEAL from an order made at Special Term, denying a motion made by the defendants for an order discontinuing the action and striking the case from the circuit calendar. This action was commenced to recover of the defendants damages for an alleged wrongful entry upon certain lands of the plaintiff, and removing therefrom trees, timber, etc. After issue was joined, an agreement, under seal, was entered into by all the parties, submitting all matters involved in said action, and presented by the pleadings therein, to the hearing, determination and decision of three arbitrators.

The agreement afterwards provided, "that the action in the Supreme Court aforesaid, and all proceedings therein, or in relation thereto, shall be stayed pending the award of said arbitrators." Subsequent to entering into the agreement, the plaintiff noticed the action for trial, and put it upon the circuit calendar.

The defendants moved the Special Term for an order discontinu-

ing the action, and striking it from the circuit calendar. This motion was denied, and from the order thereon, the defendants appealed.

J. A. Thompson, for the appellants.

———, for the respondent.

DAVIS, P. J.:

The submission to arbitration of the subject-matter of this action, was full and absolute. Its effect would have been a discontinuance of the action, but for the clause making special provision in relation to the action. That clause provides, "That the action in the Supreme Court aforesaid, and all proceedings therein or in relation thereto, *shall be stayed* pending the award of said arbitrators."

The stay of proceedings thus provided for, indicates an intention not to have the submission operate as an absolute discontinuance, as otherwise it would have done. It does, however, operate as a perpetual stay "pending the award," which must be construed to mean until the award is made. The making of the award, in the absence of any stipulation for the entering of judgment upon the same in the action, would at once operate as a final discontinuance of the suit; so that, practically, while the submission remains in force, the suit in court is completely suspended. Neither party has revoked the submission. A revocation, to put an end to the submission, must be made with the same formality as the submission itself.

The submission being in writing and under seal, it must be revoked with like solemnity.* The effect of the submission, while remaining in force, is to stay, absolutely, all proceedings in the suit.† The plaintiff was not, therefore, at liberty to take any steps in the action, after the submission. The motion to discontinue, under the circumstances, was properly denied, but the cause

* *Van Antwerp v. Stewart*, 8 John., 125; *Howard v. Cooper*, 1 Hill, 44; *Robertson v. M'Neil*, 12 Wend., 578, 582.

† *Larkin v. Robbins*, 2 Wend., 505; *Camp v. Root*, 18 John., 23; *Jordan v. Hyatt*, 3 Barb., 375; *Wells v. Lain*, 15 Wend., 99; *Van Slyke v. Lettice*, 6 Hill, 610; 11 How., 355.

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should have been stricken from the calendar, under the stay of proceedings. The order appealed from, should be modified so as to deny the motion for discontinuance, and grant that part asking that the case be struck from the calendar, and, as so modified, affirmed, without costs.

DANIELS and BRADY, JJ., concurred.

Order as modified affirmed, with costs.

GEORGE KUHN, APPELLANT, v. WARREN G. BROWN,
CHARLES W. ALCOTT, CHARLES C. WEHRUM AND
ALFRED LOCKWOOD, RESPONDENTS.

Statute of frauds.

The plaintiff sold to defendant, Lockwood, a \$20,000 bond and mortgage, and assigned to him, at the same time, a \$2,000 bond and mortgage, as collateral security thereto. At the same time, the plaintiff and the defendant, Alcott, executed an agreement, under seal, by which, after reciting that the plaintiff was indebted to the defendant, Wehrum, in the sum of \$2,000, and that the defendant, Alcott, had become security for the payment of said money, it was agreed that Lockwood should hold the \$2,000 mortgage, after payment of the \$20,000 mortgage, to secure Alcott for his liability as security. *Held*, that this was a sufficient memorandum within the statute of frauds; that the defendant, Alcott, thereby became security to Wehrum for plaintiff's debt to him; and that he was entitled to the proceeds of the \$2,000 mortgage.

APPEAL from a judgment in favor of the defendants. The plaintiff, on the 6th of August, 1869, sold to the defendant, Lockwood, a bond and mortgage for \$20,000, and at the same time assigned to him, as collateral security for the payment of the said mortgage, a bond and mortgage for \$2,000, known in this case as the Kreitz mortgage. In May, 1869, the plaintiff being indebted to the defendant, Wehrum, in the sum of \$7,066.35, it was agreed between them that Wehrum should take \$2,000 therefor, provided the defendant, Alcott, would become collateral security for the payment of said sum, and Alcott thereupon said that he would

become such security. This was all by parol, and was not reduced to writing and subscribed by Alcott, but an entry was made in his books, which, it was intended, should relate thereto. At the time of the assignment of the Kreitz mortgage to the defendant, Lockwood, the following agreement was executed by the plaintiff and the defendant, Alcott:

Whereas, George Kuhn, of Mott Haven, Westchester county, New York, is indebted to Charles O. Wehrum, of the city of New York, in the sum of \$2,000, payable on the 1st of May, 1870, without interest; and whereas, Charles W. Alcott has become and is security to the said Wehrum for the payment of the said \$2,000 on the said 1st day of May, 1870; and whereas, the said Kuhn has assigned to Alfred Lockwood, of the city of Paris, France, a certain bond and mortgage made by William Kreitz to said Kuhn, to secure \$2,000, said mortgage being recorded in the register's office of the city of New York, in liber 931 of mortgages, page 19, said assignment to said Lockwood being security to said Lockwood upon the assignment of a \$20,000 bond and mortgage made by said Alcott to said Kuhn, and by said Kuhn to said Lockwood. Now, therefore, in consideration of one dollar, it is agreed that said Lockwood may hold said \$2,000 mortgage, to secure said Alcott for his liability as security as aforesaid, and for that purpose he may, after the payment of said \$20,000 bond and mortgage, assign said \$2,000 bond and mortgage to said Alcott, to secure him for being such security as aforesaid, or to indemnify or repay to him the amount which he may pay, as such security, on or after May 1, 1870, and said Alcott agrees to use his exertions to induce said Lockwood to surrender said \$2,000 bond and mortgage, and accept other securities in the place of it whensoever said \$2,000 bond and mortgage shall be paid, if paid before maturity, so that the said \$2,000 may be paid to said Kuhn.

NEW YORK, Aug. 6, 1869.

GEORGE KUHN. [L. s.]

C. W. ALCOTT. [L. s.]

Witness:

WARREN G. BROWN.

{ U. S. Rev. Stamp. }
{ 5 cents, canceled. }

The Kreitz mortgage was paid to Lockwood, in November, 1869. At the time of the commencement of this action, there was about \$10,000 due on the mortgage sold to Lockwood, and at the time of the trial, about \$400. The plaintiff brought this action to recover from Lockwood the proceeds of the Kreitz mortgage, and, at the trial, he tendered to him the whole amount due on the \$20,000 mortgage. The case was tried before Mr. Justice BRADY without a jury, and a judgment was entered, by which it was adjudged that the defendant, Alcott, was legally liable as guarantor of the debt of the plaintiff to Wehrum, and the defendant, Lockwood, ordered, after the \$20,000 bond and mortgage should have been fully paid, to pay over the proceeds of the \$2,000 mortgage to the defendant, Wehrum. From this judgment the plaintiff appealed. The following opinion was delivered by Mr. Justice BRADY at the Special Term :

BRADY, J. :

The question presented in this case, although not free from difficulty, is, nevertheless, to be determined on general principles.

The statute of frauds requires that every special promise to answer for the debt, default or miscarriage of another person, shall be void, unless some note or memorandum of the agreement, be in writing and subscribed by the party to be charged, and the decisions which have been made, declare that the agreement or memorandum, when made, shall be sufficiently explicit to show the obligation assumed, either by its own terms or other memoranda connected with it, and of which it is a part.

Prior to the substitution in our statute, of the word "subscribed" for the word "signed," the name of the promisor at any place upon the memorandum, was held to be a compliance with its terms, but now the subscription must be at the foot of the agreement, which contains the engagement made.

It has also been held, and the law has not been changed, that it is sufficient to meet the requirements of the statute, if the memorandum be signed by the party to be charged.

These principles are so familiar, that it is not considered necessary to refer to the authorities. In this case, after the parties had met, and the defendant, Alcott, had verbally assumed to pay the plaintiff's debt to Wehrum, a memorandum was made in Alcott's books

of the transaction, which, as subsequent entries clearly show, was intended to express Alcott's liability to Wehrum. The original entry was made by Wehrum, under the direction and in the presence of Alcott, but in itself does not show that the latter undertook to pay the plaintiff's debt. It has no such import. If it had, the signature of Alcott, whether made by him or under his direction, appearing in connection with the memorandum, and in such relation to it as it does, might justly be held to be in conformity to the spirit of the statute, and therefore binding upon him.

The intention of the parties—the design of Alcott and Wehrum, in making the entry which was supposed to be in conformity to the understanding of the plaintiff and them—is apparent, and leaves no room for doubt.

Alcott still adheres to the agreement, and evidently considers himself bound to perform it. The plaintiff, however, availing himself of the statute, insists that Alcott is not bound by any promise or agreement which he gave; that no memorandum in writing subscribed by him was made containing it, and that it is therefore utterly void. If this premise is well founded, the result is as claimed. It appears, however, that after the agreement was made, and the attempted record of it put in Alcott's books, the plaintiff and he met, and the paper of the 6th of August, 1869, was executed by them. This clearly recognizes the obligation assumed by Alcott for the plaintiff's benefit, and is signed by both. It recites that the plaintiff was indebted to Wehrum in the sum of \$2,000, payable on the 1st of May, 1870, without interest, and that Alcott had become, and was security to Wehrum for the payment of the sum named, on the day named, and then provides that the defendant, Lockwood, may hold a mortgage in his hands, to secure Alcott for his liability as security to Wehrum, and may assign the mortgage to Alcott, after it should be released from Lockwood's lien, arising from its deposit with him by the plaintiff. That paper refers undoubtedly to the verbal agreement made between the parties (plaintiff Alcott and Wehrum), that the latter would accept \$2,000 in full of his claim against the plaintiff, if secured by Alcott's engagement to pay it in case the plaintiff did not. It does not refer to the agreement, as such, but to its effect, assuming it to be valid and binding.

In disposing of the question presented, therefore, I propose to predicate Alcott's liability, entirely, of the paper of the sixth of August.

It is therein stated, as already suggested, that Alcott had become, and was security for the payment of the sum of \$2,000, on the 1st May, 1870, and it is provided that Lockwood may hold the mortgage referred to, to secure Alcott against his liability, as stated. Does this paper, signed by Alcott, sufficiently express his agreement with Wehrum?

If it does, then, being signed by the former, the party to be charged in favor of Wehrum, it is not within the statute, and the promise is not void.

In my judgment, the agreement sufficiently appears. The plaintiff acknowledges that he was to pay Wehrum the sum of \$2,000 on the 1st May, 1870, and that Alcott was security for its payment on that day.

The duty imposed upon Alcott, indicated by the legal and ordinary acceptation of the word "security," was to pay the debt named, in case the plaintiff failed to pay it at the time designated, and thus, whether between themselves, as principal and surety, or between them and Wehrum, the indebtedness and its time of payment were clearly defined.

It is the written acknowledgment of the debt due, and the reiteration of Alcott's agreement to pay it, in case the plaintiff omitted to do so. The language of the paper is, "has become and is security," and thus relates back to an agreement, the result of which is not only in effect stated by the use of the word "security," but its terms sufficiently given in detail. Assuming the original agreement to be insufficient, this recognition and repetition of it, recreates and give it vitality.*

The statute requires some note or memorandum, and it is not material whether the identical agreement be signed or not.

If the note or memorandum appears in any form or paper containing the agreement, it is sufficient. The language of the statute is general. The note or memorandum is not limited in terms to one mode between the creditor and promisor, nor does it demand

* Gale v. Nixon et al., 6 Cow., 445; Roberts on Frauds, 121; Webster v. Zelly 53 Barb., 482.

that the note or memorandum shall be subscribed by both parties. It exacts only a note or memorandum of the agreement, subscribed by the party to be charged therewith.

The object of the statute, which was to prevent frauds perfected by false swearing, or, as stated by Senator VERPLANCK, in *Davis v. Shields*,* "The prevention of frauds and perjuries, by substituting for the loose recollections of memory and the mutual danger of misconception of parties, a precise written agreement, or at least, a distinct written memorandum of the contract," is accomplished, if, in any paper signed by the promisor, it shall appear that he made the agreement which is charged against him. His subscription makes it apparent that the claim has not been manufactured to be sustained by perjury. Hence, we find the rule stated by Justice SUTHERLAND, in *Gale v. Nixon*,† to be, "It is not necessary that the identical agreement should be signed, but if it is acknowledged by any other instrument, duly signed, it is sufficient," and it rests, as already shown, on a good reason. The paper containing the note or memorandum in this case, is an agreement between the debtor and promisor, relating to the debt, in which the creditor's name not only appears, but also the engagement made with him by the promisor, against which the latter sought, by that paper, to protect himself. These elements are controlling, and make it clear that the promise of Alcott was valid, and not within the statute of frauds.

The consideration of the promise is sufficient. The defendant, Wehrum, having a claim of \$7,000 against the plaintiff, agreed to take \$2,000, if the defendant, Alcott, would become security. An agreement by a creditor to take less than the face of the demand, upon receiving security for the amount paid, is valid. Where, by the agreement to settle, there is a benefit, or even a legal possibility of benefit, to the creditor, the additional weight will turn the scale, and render the consideration sufficient. ‡

Having arrived at these conclusions, it follows that the plaintiff cannot recover. The gravamen of his complaint is, that the promise of Alcott was not binding, and the agreement of the sixth August, therefore, void.

* Wend., 854.

‡ Phillips v. Berger, 2 Barb., 608.

† 6 Cow., 448.

I have not considered it at all necessary to examine any other question than the one discussed, deeming it conclusive.

It is proper, however, to say that there is no evidence justifying the charge that the paper of the sixth August was obtained by fraud or deceit.

Inasmuch as the question presented is not free from difficulty, as already suggested, I think but one bill of costs should be awarded the defendants unitedly, all having appeared by the same attorney. I think, however, that a reasonable allowance in addition should be made, and its amount determined on the settlement of the decree to be entered herein.

Ordered accordingly.

On the appeal to the General Term :—

Edward P. Cowles, for the appellant, insisted that there was no valid promise by Alcott, within the statute of frauds. (*Mallory v. Gillett*, 21 N. Y., 413.)

Warren G. Brown, for the respondents, insisted that the promise of Alcott was legal and valid, and could be enforced. (*Gale v. Nixon*, 6 Cow., 445; *Roberts on Frauds*, 121; *Welford v. Beazely*, 3 Atk., 503; 3 Bro. Ch., 318; 1 Ves., 6; 9 Id., 355. *Webster v. Zeilley*, 52 Barb., 482.)

DAVIS, P. J. :

All allegations of fraud or imposition on the appellant, in procuring the instrument of 6th of August, 1869, having been distinctly withdrawn during the trial (as appears at fol. 202 of the case), that paper stood, as the court then remarked, unimpugned and upon its legal effect. It was upon this instrument that the learned judge, at Special Term, predicated the defendant, Alcott's liability, as surety for plaintiff, to the defendant Wehrum. The instrument recited that Alcott had become, and was, security for the payment of the sum of \$2,000 to the defendant Wehrum, on

the 1st of May, 1870, and provided that Lockwood should hold the mortgage of Kreitz, as an indemnity to Alcott upon his liability as such. It was signed and sealed by both the principal and surety. This was, in our opinion, sufficient to take the promise of Alcott out of the operation of the statute of frauds. The reasons given by BRADY, J., in his opinion at Special Term, are quite satisfactory to us on this point, and we adopt them as expressing what we deem to be the law.

The effect of the tender of the money, due on the \$2,000 mortgage, is not material to be discussed in this case, so far as relates to the \$20,000 mortgage, held as collateral. When the suit was commenced, the Kreitz mortgage was properly held by Lockwood as collateral to the balance claimed to be unpaid on the \$20,000 mortgage, but, as between the appellant and Alcott, the Kreitz mortgage was also held to secure Alcott on his obligations as surety for appellant's debt to Wehrum. The right and duty of Lockwood to still hold the Kreitz mortgage as assignee, for Alcott's benefit, under the instrument of sixth of August, would still remain after the extinguishment of the debt, to which he held it as collateral for his own benefit. Lockwood is not denying, but affirming, this liability, and thereby ratifying the act of his agent, Brown, in receiving the agreement, clothing him with that power.

Alcott, who is also a defendant in the suit, makes no question whatever of the validity of his agreement to be security. How far, under such circumstances, the principal debtor, who has placed in his hands, or in the hands of a third person, collateral to indemnify him against such liability, can be permitted to raise the question, it is not necessary to determine. Upon the facts found by the judge, we are of opinion that his conclusion of law was sound, and that the judgment rendered thereupon, should be affirmed.

DANIELS and WESTBROOK, JJ., concurred.

Judgment affirmed.

IN THE MATTER OF THE APPLICATION OF WILLIAM M. TWEED,
FOR A WRIT OF PEREMPTORY MANDAMUS, v. NOAH DAVIS,
ONE OF THE JUSTICES OF THE SUPREME COURT.

Bill of exceptions — settlement of — exceptions, how stated in — mandamus — juror — rejection of when competent — not ground for new trial — challenge.

A bill of exceptions should contain only a concise statement of facts, presenting the points intended to be relied upon as ground of error, or simply so much of the evidence as may appear to be requisite for that purpose.

The court cannot determine whether any particular thing occurred on the trial; that is necessarily within the province of the justice settling the case or bill. He cannot be compelled by mandamus to change his decision.

A large number of written propositions were presented at the conclusion of the evidence, which the court was requested, by the defendant's counsel, to instruct the jury to be the law. In many of these, the court differed from the defendant's counsel in the charge which was given to the jury; and, as that was concluded, and the jury were about to retire, the defendant's counsel stated that they excepted, for the defendant, to each refusal, modification or departure which had been made in the charge, from the proposition submitted. *Held*, that defendant's counsel were not entitled to insert in the bill of exceptions, specific exceptions to the several portions of the charge which they considered constituted such refusals, modifications or departure.

If an exception be taken on substantially the same state of facts, and on the same point, more than once, a single statement of it is all that is proper in a bill of exceptions.

After a trial by an impartial jury, the fact that others, called as jurors, who were equally competent, but no more so, were excluded from the jury, is not ground for a new trial. (WESTBROOK, J.)

THE motion made in this case, is for a writ of peremptory mandamus, requiring Mr. Justice DAVIS to insert, in the bill of exceptions proposed by the applicant, certain evidence, rulings and exceptions, rejected by him, as not properly forming any portion of that document.

John Graham, William Fullerton, W. O. Bartlett, Elihu Root, and Willard Bartlett, for the motion.

B. K. Phelps, district attorney, and *W. H. Peckham*, opposed.

DANIELS, J. :

The applicant was tried and convicted in the Court of Oyer and

Terminer, held in the city of New York, upon an indictment charging him with various misdemeanors, committed in an official capacity. Exceptions were taken during the trial, to decisions made in the course of it by the learned justice at the time presiding in the court. And these exceptions are intended to be relied upon in support of an application designed to be made for a reversal of the conviction. Upon such an application, objections of a legal character can alone be considered. For that reason, the evidence at large is not required to be presented to the court, neither should it be, under the well-established rules of practice relating to this subject. All that is proper in such an instrument, is a concise statement of facts, presenting the points intended to be relied upon as ground of error, or simply so much of the evidence as may appear to be requisite for the same purpose. That is all that the rights of the defendant, or a proper administration of the laws, can possibly require. And what is added beyond that, only tends to embarrass and confuse the points to be presented, by withdrawing or diverting the attention of the court from their consideration. It is a mistake to suppose that the excess can do no harm, when its separation from what may be really important for the decision of the case, requires the consumption of time that ought to be bestowed upon the substantial points in controversy. Cases are frequently, as well as needlessly, made so exceedingly voluminous, as to render the duty of sifting out the important from the unimportant matters contained in them, one of a laborious and exhausting character. This is not only unnecessarily expensive to the parties, but, beyond that, injurious to their interests, as well as unjust and burdensome to the courts required to examine them. In order to avoid sanctioning such improprieties in practice, it becomes necessary, whenever an application of this nature is made, to examine the matters proposed to be added to the bill, for the purpose of determining whether they actually transpired, and, if they did, whether they are proper and appropriate for the support of any legal points arising upon the trial. It is not intended to be affirmed, that the court can enter upon the solution of the inquiry, whether a particular occurrence transpired upon the trial, which the presiding justice may have rejected as forming no part of the proceeding, for that is necessarily within the province of the

justice settling the case or bill. He must decide, from the evidence before him, whether disputed evidence was given, or contested exceptions were taken. And for that purpose, he may hear and consider the affidavits of the parties and their counsel, inspect their notes as well as his own, and consult his own recollection, as well as other accessible means of information, for the purpose of settling the controversy between the parties concerning what may have actually taken place. Beyond that, it does not seem practicable to extend the investigation, otherwise there would be danger of protracting the litigation indefinitely, resulting from a single controversy; for if the fact could be tried by way of mandamus, when disputed, whether a particular exception was taken, or certain evidence was given, during the progress of a trial had in a court of record, it could only be done under the Constitution and statutes of the State, as other disputed facts are tried, and that is by jury.* That would afford an opportunity for the extension of litigation, that has never yet been sanctioned. A persistent adversary, aided by ingenious and persevering counsel, might, in that way, prevent parties from ever reaching the final end of a legal controversy; for, if such a proceeding could be taken to ascertain what occurred upon the first trial, the same thing might be done as to the second, or any succeeding trial, until the proceeding might be rendered endless in its character. The peace of the community, as well as the interests of the parties, requires that no such device as that, for the prolongation of litigation, should be allowed or tolerated. A remedy like that, would prove more disastrous than any of the misapprehensions or mistakes, it could be used to correct; and it would be liable to involve the judges of courts of record in legal controversies, concerning their own judicial duties, on the application of disappointed or malignant suitors, to such an extent as seriously to impair, if not altogether destroy, their usefulness. It has no sanction from authority. But, beyond that, it is in direct conflict with the conclusion maintained by well-considered, as well as long-sustained expositions of the law exempting judges of courts of record from actions against them on account of their judicial action. In

* 2 Revised Statutes (Edmond's ed.), 608, §§ 55, 56. † 6 Barn. & Cross, 611.

Garnett v. Ferrand,† Lord TENTERDEN declared it to be “a general rule, of very great antiquity, that no action will lie against a judge of record for any matter done by him in the exercise of his judicial functions.” And “this freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public and for the advancement of justice, that, being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be.”* The same principle was just as broadly asserted by Chief Justice DE GREY, in *Miller v. Scare*,† and by Chief Justice KENT, in *Yates v. Lansing*.‡

What transpired upon the trial, must, therefore, be ascertained from what the justice presiding, finds to be the truth. His determination, after hearing the parties, is judicial, and must be conclusive upon the court, in the disposition of an application like the present one. It cannot be required to enter upon the investigation of a disputed question of fact, but simply to ascertain what are the undisputed or conceded facts, and, after determining them, to conclude whether the bill of exceptions should properly contain a statement of them, and, in doing so, this court can neither enlarge nor restrict them; its simple office is to decide whether any point, presented by the party making the bill, requires them to be embodied in it, for its proper consideration and decision.

The most important respect, in which the bill of exceptions in the present case is claimed to be defective, relates to the charge of the learned justice to the jury. A very large number of written propositions were presented at the conclusion of the evidence, which the court was asked by the defendant's counsel, to instruct the jury to be the law. In many of these, the court differed from the defendant's counsel, in the charge which was given to the jury. And as that was concluded, and the jury was about to retire for the purpose of entering upon their deliberations, the defendant's counsel stated that they excepted, for the defendant, to each refusal, modification or departure, which had been made in the charge from the propositions submitted. This was the substance of the action of the

* 6 Barn. & Cress., 625.

† 2 Black., 1145.

‡ 5 John., 282; *Weaver v. Devendorf*, 8 Danio, 117; *Vose v. Willard*, 47 Barb., 320.

defendant's counsel upon this subject, though not perhaps expressed in the terms employed by them. No attempt was made to except to particular propositions contained in the charge, and relied upon as erroneous, as is usually done upon such occasions. Neither was it pointed out, in what respect, or to what extent, the court had refused to charge the defendant's propositions, or where they had been modified or departed from. To determine where that was the case, would, in many instances, undoubtedly, prove an exceedingly difficult matter, for what one person would consider to be a modification or departure, would be regarded by others as presenting no shade, even, of difference.

The defendant's counsel, in making their proposed bill of exceptions, have added a specific exception to what they deem refusals, modifications or departures, regarding their propositions. But whether they are correct in these positions or not, this court has no means from which it can determine. It is certain, however, from the papers presented in support of this application, that the specific exceptions, as they are now proposed to be added, were not taken by the defendant's counsel upon the trial. And that would be reason enough for excluding them from the bill. Indeed, very great injustice to the public interests might be done by adopting any other course; for, if specific exceptions are now allowed to be stated, to whatever may be claimed to be refusals, modifications or departures in the charge, points may be presented upon the argument of the cause, which might have been explained, changed or altogether withdrawn, if they had been at the time brought to the attention of the court. One object of requiring the proposition excepted to, to be stated at the trial and in the presence of the jury, is to afford an opportunity for such corrections. If the correction is refused, then a distinct subject of exception is at once presented, concerning which, misunderstanding will be rarely found to exist. But no such opportunity is afforded by so general an exception as was taken upon the trial of this defendant. It could hardly be otherwise, than that differences of opinion would exist concerning its subdivision.

In the settlement of the bill of exceptions, the court has disallowed the distribution proposed to be made of the exceptions; and this court has no reason for holding that there is anything improper in that conclusion. The exception has been allowed, just as it was

presented at the close of the trial. This court cannot render it any more specific, without requiring the learned justice to insert in the bill, what it is not even claimed really transpired. If it did so, it would require it to contain what was not true, so far as this general exception would, by such a ruling, be changed into a multitude of specific exceptions, presenting as many distinct and separate propositions, many of which would probably have been explained or changed, if attention had been directed to them before the jury retired. The exception taken to what was said concerning the McBride Davidson bill, which was stricken out of the charge, appears to have been allowed to remain in the case, in another place. That is entirely sufficient for the purposes of the case. One statement of it is just as effectual as though it were repeated on every page. The justice was entirely right in limiting the exception to a single statement of it. He could do no less than that under the rule adopted by the court. That provides that "Exceptions shall only contain so much of the evidence as may be necessary to present the questions of law upon which the same were taken on the trial, and it shall be the duty of the justice, upon settlement, *to strike out all the evidence and other matters* which shall not have been necessarily inserted." *

The principle established by the decisions of the courts, is equally explicit. They hold that it is "not only unnecessary but inconvenient to load a bill of exceptions with extraneous matters. Everything is so, beyond what may be essential to present the naked point of law which is the true office of a bill of exceptions." †

Reasons assigned by the justice presiding at the trial, for some of the decisions made, were excluded from the bill at the time of the settlement. And that is relied upon as improper, by way of supporting the present application. But, as they formed no part of the proposition decided, there was no impropriety in rejecting them. Legal points, arising during the trial of either a civil or criminal case, are reviewed upon the facts, or the evidence presenting them, and the exceptions by which they are reserved. And the reasons leading to them, are altogether unimportant for that

* Rule 48 of Supreme Court.

† Ex parte Jones, 8 Cowen, 128; Denison v. Seymour, 5 Wend., 103; Price v. Powell, 3 Com., 323.

purpose. If the decision be right, it will not be disturbed because unsound reasons may have produced it; neither will it be sustained when wrong, even though the best of reasons may have been given for making it. No harm was done the defendant, by rejecting these reasons, as long as judgments are not reversed for error, only shown in the opinion of the court.*

Two jurors, Owen C. Owens and James W. Hay, were called, and, after being examined, rejected as not impartial; and certain exceptions taken to decisions concerning them, it is claimed, should have been retained in the bill. The first juror was challenged for principal cause by the defendant's counsel. After an extended examination, it was found to be unsustained, and for that reason overruled. To the decision overruling it, the defendant's counsel excepted. He was then challenged to the favor by the same counsel, and after a further examination, had for the purpose of sustaining it, that challenge was withdrawn. The prosecution then renewed the challenge for principal cause, which, after a further examination of the juror, was overruled. Then the same juror was challenged to the favor by the prosecution. And, in support of the challenge, it was made to appear that he was on friendly and familiar relations with Miller, who appeared to be a friend of the defendant. The court found this challenge unsustained, and then rejected the juror because he was supposed to be biased in favor of the defendant; and the defendant's counsel excepted to the decision. This decision, upon which the juror was rejected, rendered those previously made concerning him, entirely unimportant.† It became immaterial whether the decisions, made upon the other challenges, were correct or erroneous. If the rights of the defendant were in any respect prejudiced by the disposition made of this juror, the wrong was exclusively done by the last decision, which was dependent upon nothing but the evidence given in the support of the last challenge made by the prosecution. That evidence, decision and exception, were allowed to remain in the bill, while the evidence, decisions and exception on the preceding challenges, were excluded from it. This was certainly right; because all that was done concerning the juror, prior to the

* *Laning v. N. Y. Central R. R. Co.*, 49 N. Y., 522.

† *Freeman v. People*, 4 Denio, 10.

last challenge to the favor, became inoperative and without the least effect, by his final rejection on that challenge. If the preceding proceedings, concerning the juror, had remained in the bill, no advantage whatever could have been derived from them by the defendant. For that reason, it was the duty of the justice to reject them, as he did, under the rule and authorities already mentioned.

The other juror, Hay, was first challenged for principal cause, on the part of the defendant, and the challenge withdrawn after an examination of the juror. It was then renewed by the prosecution, and, after a further examination of the juror, overruled by the court. So far, nothing transpired concerning this juror which the defendant could reasonably claim, should become a portion of his bill. For his challenge had been voluntarily withdrawn, and as the decision made by the court was in favor of the juror's competency, and against the prosecution, the defendant's counsel did not, and properly could not, except to it. But after that decision was made, the same juror was challenged to the favor by the prosecution. And after an examination made of the juror, in support of that challenge, it appeared that he probably entertained an opinion on the subject of the defendant's guilt or innocence, and for that reason he was held incompetent, as not being impartial, by the court. The challenge to the favor was, in other words, found to be sustained, and the defendant's counsel excepted to that decision. The proceedings and decisions upon this challenge, were excluded from the case, and properly so, too, because the point which could be made upon them, if the decision was erroneous, is more clearly presented by the decision rejecting the preceding juror. The evidence concerning the partiality of this juror, was much more decided and cogent than that given, from which it was held that Owens was incompetent. For that reason, if the defendant's exception can be maintained, as to the decision rejecting either one of these two jurors, that is more likely to be the case as to Owens, than as to Hay. If the exception taken to the decision rejecting Owens, cannot be sustained, then it is very clear that the exception taken as to Hay's rejection, must fail, for much the strongest case was made against his impartiality. No injustice can possibly result, therefore, from the exclusion of the

proceedings and evidence on which Hay was rejected; no good reason existed for retaining them in the bill, as long as the point involved in them, was retained and presented in a much more favorable shape for the defendant, by what transpired under the challenge on which the other juror was set aside. An exception is never strengthened by its repetition upon the same substantial state of facts. A single statement of it, is as effectual as any number of repetitions, by any possibility, can be. As the last exception could not possibly aid the defendant's case, it was the duty of the justice to strike it out of the bill, with all the evidence relating to the decision to which it was taken. It was so much useless material, having no other effect than to incumber the bill, as long as the same point, designed to be presented by it, had been preserved by the preceding exception. This substantially disposes of the positions, taken in support of the defendant's application against the learned justice before whom he was tried, and as none of them are found capable of being lawfully maintained, it follows that the motion for a mandamus must be denied.

WESTBROOK, J. :

Fully concurring in the opinions expressed, and conclusions reached by my associates, I desire to add a word upon one or two questions presented by this application.

It is conceded that the counsel for Mr. Tweed did not, upon the trial, call the attention of the court to the portions of the charge to which they desired to except, but contented themselves with taking one general exception to each and every point of the charge which was inconsistent with, or contrary to, all, or any of the requests to charge. Under the exception thus taken, they claim the right to pick out such portion of the charge as they deem to be covered by the general exception, and present a specific exception to each. Should this application be granted, the bill of exceptions would not be true. It would then show separate and specific exceptions to various portions of the charge, when none were in fact taken in that form, and when it is conceded that only a single exception was taken, in fact, though intended by its language to cover several parts thereof.

As the office of the bill of exceptions, is to present the exceptions

taken, and no other or different, I do not see how the present motion can be granted, without a departure from a fundamental rule. If, as is claimed by the counsel for Mr. Tweed, the exception, in the form it was taken, is unreasonable, I do not see how it is in the power of this court to relieve them, without a substitution of exceptions, never taken upon the trial, for the ones actually presented. This would be so clear a departure from precedent and from truth, as to be unwarrantable. Again, if the exception, in the form it was taken, be available, it ought not to be within the power of the court, before which the cause was tried, nor of this court, to limit the effect of the exception, by selecting the portions of the charge to which it is applicable. The court of review should be allowed to determine the scope and effect of the exception presented, without being limited and controlled in its judgment, by the decision of any subordinate tribunal.

In regard to the proceedings had upon the rejection of the jurors, Owens and Hay, it may not be improper to say, that, in my judgment, there would have been no error, if everything in regard to those challenges, had been omitted. Both of these jurors were found to be incompetent, and so long as the defendant was tried by twelve others, who were competent, we do not see that the rejection of these two, conceding their competency, could have in any way prejudiced him. A different question would be presented if an incompetent juror had been pronounced competent. In that event, it could readily be seen that the rights of the defendant to a trial by an impartial jury, had been infringed, but when twelve unbiased men have rendered a verdict, it is impossible to say that the exclusion of others, equally competent, but no more so, has produced any injury. This point was expressly adjudged in the third department, in the case of Burk and others, plaintiffs in error, against The People, defendants in error; and in the opinion of POTTER, J., delivered in that case upon this point, I fully concur.

BRADY, J.:

The rule established by the cases upon applications, kindred to this, is, that a mandamus will be ordered commanding a judge to sign a bill of exceptions, but not to settle it in a particular manner, when there is a dispute as to the incidents of the trial. The justice

who presided, must say whether or not an exception was taken, and his return is controlling, at least until further proceedings. If the return is alleged to be false, the suggested remedy is by action;* but whether such a remedy in fact exists, *quere*.†

In England, according to Tidd (*supra*), if alternative writ contains the surmise of an exception taken and overruled, the command is to sign the bill *quod si ita est* (if it be so), but if the judge returns *quod non ita est* (it is not so), an action lies at the instance of the aggrieved party. If he establish the falsity of the return, he recovers damages, and the peremptory mandamus goes forth, because the jury have declared that the exception was taken.

In this State, in one case, it was said that a referee would be compelled by mandamus to settle a case, and settle it correctly;‡ but the writ was not issued, owing to some informality in the proceedings. The decision was made at a Special Term, and is predicated of the cases in 1 Caines, 6 John. and 5 Wend. (*supra*), but an examination of these cases shows that the proposition asserted is not warranted by them, and the case stands alone. I have not found any case, in which it has been declared that a mandamus would be issued against a judge, commanding him to settle a bill of exceptions in a particular manner, when, as to the manner, there was a dispute. There were no authorities to that effect cited on the argument. In this matter, there is a dispute as to the correctness of the bill as passed upon by the presiding justice, in reference to exceptions, and he certifies that it is correct, although, having directed it to be engrossed, it has not yet been presented for his signature.

There seems to be a concession that an exception was taken to the exclusion of the juror, Hays, upon a challenge to the favor, but the presiding justice certifies that he was excluded for mental incompetency, and it was so understood. Upon a careful examination, not only of the authorities but of the application, I have

* People v. Judges of Washington, 1 Caines, 511; People v. Judges of Westchester, 2 John. Cases, 118; Fish v. Weatherwax, 2 John. Cases, 215; Sikes v. Ransom, 6 John. Rep., 279; People v. Sessions Wayne Co., 15 How., 323; Tild's Pr., 708; Delavan v. Boardman, 5 Wend., 132.

† See Weaver v. Devendorf, 3 Denio, 120. ‡ The People v. Baker, 35 Barb., 106.

arrived at the conclusion, for the reasons assigned, and those presented by Justices DANIELS and WESTBROOK, that the mandamus asked for, should not be granted.

Mandamus denied.

GRANDISON F. READ, RESPONDENT, v. DUBOIS SMITH,
APPELLANT.

Memoranda — evidence — presumption.

Plaintiff testified from an account-book, as to money advanced to, and paid for, the use of defendant. The defendant offered in evidence the remaining portion of the book, from which plaintiff had testified. On objection by plaintiff, the referee ruled to allow the book in evidence, so far as related to any transactions between plaintiff and defendant. The defendant excepted and moved to strike out the testimony of the items, mentioned in the book referred to, unless the book should be put in evidence by the plaintiff. The motion was denied, on the ground that the book was in evidence as to the entries of transactions between plaintiff and defendant. The defendant again excepted. *Held*, that when defendant offered one portion in evidence, it was error to admit another portion, which he did not offer.

Where plaintiff testified from an account-book as to moneys advanced to defendant, and such portions of the account-book as contained entries showing such advances, were in evidence, *held*, that the referee erred in refusing to allow defendant to test the accuracy of the entries proved, by showing, by other entries in the book, that they were not made at the dates claimed, and for this purpose, showing that they were not chronological in order with other entries, or had been interpolated amongst other entries.

On the trial of an issue involving the question whether money loaned had been repaid, *held*, that it was error to exclude evidence, showing that subsequent to the loans in question, other money had been loaned and repaid between the same parties; as such evidence might raise a presumption that the older claims had also been paid.

APPEAL from a judgment entered on the report of a referee.

John H. Strahan, for the respondent.

M. Huntley, for the appellant.

DAVIS, P. J. :

This action was brought to recover various sums of money, alleged to have been loaned by plaintiff to defendant, and paid to his use, at different times between the 11th of October, 1865, and the 22d day of December, 1866. The plaintiff testified to the various loans and payments set out in his bill of particulars, and that he made a memorandum at the time he made each loan; that he had the memorandum still, and from it, had given his testimony. The plaintiff did not put the memorandum in evidence.

On cross-examination, it appeared that the memoranda, referred to by plaintiff, were contained in a book called, "private petty cash." He was examined quite closely as to the entries in the book, of the several loans, and, amongst other things, testified that the entries were, in the main, made by him on the several days of the alleged loans; that he recollected, on one or two occasions, he put the loans on slips of paper, and a few days after, put them in the book. The defendant offered "the remaining portion of the book, from which plaintiff has testified, in evidence." This was objected to by plaintiff, and the referee ruled to allow the book in evidence, so far as relates to any transactions between the plaintiff and defendant. The defendant excepted, and moved to strike out the testimony of the items mentioned in the book referred to, unless the book be put in evidence on the part of plaintiff. The motion was denied, on the ground that the book was in evidence as to the entries of transactions between the plaintiff and defendant, and the defendant again excepted. It was certainly a pretty sharp ruling, when the defendant offered one portion in evidence, to admit another portion, which he did not offer, and which was not then in evidence. If the portion so admitted, is to be regarded as put in by defendant as evidence on his part, the ruling of the referee was erroneous, for it was clearly improper, when the defendant offered other matter contained in the book, to treat him as offering something else, and thereby affect his further right to investigate fully the correctness of the entries received. But the form of the offer seems to have assumed that the memoranda, referred to by plaintiff, were already in evidence, and the ruling of the referee will, perhaps, bear the construction that he intended simply to define how far he would receive the book as evidence on plaintiff's part, and to reject the

residue. The book being thus far in evidence, the defendant proceeded to examine plaintiff in relation to entries in the same book, just preceding and following the memoranda of loans. The first entry of cash loaned was, "Oct. 11th, 1865." The plaintiff was asked to look at the book and the three entries next succeeding that entry, and state the same fully. This was objected to by plaintiff, and the objection sustained, on the ground that the entries referred to, do not apply to transactions between the parties.

The defendant's counsel then offered in evidence portions of the book, commencing with the entry of October 11th, 1865. The objection was sustained. He then put to plaintiff the following question: "What are the two entries in your book immediately preceding and following the entry of October 11th, 1865?" This question was objected to, the plaintiff saying, in answer to a question of the referee, that those entries did not have any application, or refer to the transactions between him and defendant. The referee sustained the objection, and defendant excepted. The defendant's counsel then asked the witness to describe the portion in the book of the entry of October 11, 1865, and state what entry immediately follows it. This also was excluded on the same ground; and divers similar questions, touching other entries of charges against defendant, and the character and dates of the entries preceding and following them, were likewise overruled.

The referee was altogether too rigid in his rulings. After admitting the entries of loans, as contained in plaintiff's books, as evidence, either against defendant or to corroborate plaintiff's statements, he should have allowed the defendant to test the accuracy of the entries, by showing, if he could, that they were not, in fact, made at the date claimed. One mode of doing this, was to show that they were not chronological in order with other entries in the book, or had been interpolated amongst such entries, or bore, on their face, when compared with other immediately connected entries, some suspicions of unfairness or bad faith. The defendant claimed that some of the loans had never been made, and that others had been paid, and he was entitled, in any legitimate mode, to impugn the statements of plaintiff, and the contents of his book. I think the referee erred in excluding a very proper line of investigation and scrutiny.

There were several other exceptions to the exclusions of questions, which are open to criticism, but one of which will be commented upon. The claim of plaintiff, it will be remembered, was for moneys loaned and moneys paid in 1865 and 1866, and which the defendant testified had been fully paid. He also testified that in 1867 and 1868, the plaintiff loaned him moneys, and made advances on his account, to about the amount mentioned in the complaint. He was then asked: "Were such amounts so loaned or advanced repaid by you to the plaintiff?" This was objected to, and the objection sustained, and defendant excepted.

He was then asked: "Did the plaintiff give you receipts for the same?" This also was objected to and excluded, and defendant excepted.

It is to be borne in mind that defendant had testified that all the loans and advances of 1865 and 1866, had been paid, and, on this question, was in direct conflict with plaintiff. To show that similar loans and advances had been made in 1867 and 1868, and that they had been paid, and that plaintiff held receipts for them, would raise a presumption, of greater or less force, that the older claims had also been paid. The defendant was entitled to the benefit of that presumption, so far as it would go to strengthen his testimony and the facts which he sought to show; and the receipts, if proved, were proper subjects of consideration by the referee, in balancing the probabilities as to the truth or falsity of their respective statements. It was error to exclude such evidence.

We think the judgment should be reversed, and a new trial ordered, with costs to abide event.

DANIELS and LAWRENCE, JJ., concurred.

Judgment reversed and new trial ordered, costs to abide event.

JAMES S. WATSON, RESPONDENT, v. ELIZABETH W.
WATSON, APPELLANT.

Divorce—judgment—motion to set aside after death of plaintiff.

Where a judgment for divorce has been obtained by the plaintiff against the defendant, and the plaintiff has subsequently died; *held*, that a motion, made upon papers served upon his administrator, to set aside the judgment for fraud and irregularity, was properly denied.

APPEAL from an order at Special Term, denying a motion made by defendant to set aside a judgment of divorce. On the 3d of September, 1863, the plaintiff obtained a judgment of divorce against the defendant. The plaintiff died in June, 1872, intestate, and on the 31st of January, 1873, letters of administration were granted to Frederick A. Watson. In May, 1873, the defendant made a motion against the said administrator, to set aside the judgment on the ground of fraud, irregularity, etc. The motion was denied, and the defendant appealed.

Ira Shafer, for the appellant.

J. M. Smith, for the respondent.

DAVIS, P. J.:

This is an appeal from an order of the court at Special Term, denying the motion of defendant to set aside a judgment of divorce, entered September 3d, 1863. The plaintiff, who obtained the divorce, died in the fall of 1872, intestate, and the motion is now made, upon service of papers upon his administrator. The grounds are fraud and irregularity. If the facts stated in the moving papers are true, there certainly ought to be some relief for the defendant; but the question before us is whether that relief can be obtained on motion, and on notice simply to the administrator of the estate. We think it cannot. No authority is cited for such practice. The administrator has no power to consent to setting aside the judgment. He has no control or authority over it. There is no pecuniary recovery to be enforced by him. The decree simply dissolves

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the marriage relation and disposes of the custody of the children, both which are questions in which the administrator, *as such*, has no legal interest whatever. It is said that he is interested in the question whether the defendant is entitled, as widow, to a distributory share of the estate, or is cut off therefrom by the judgment of divorce; but in that question, as administrator, he has no legal interest. The distribution, after payment of debts, is made by decree of the surrogate, and the representatives cannot properly be said to have any legal interest, whether the decree shall award the whole to the children of the intestate, or distribute a portion to defendant. We cannot avoid the conclusion that the motion was properly denied. An action, in the nature of a bill of revivor, bringing before the court all the heirs-at-law, and other persons interested in the real estate left by the decedent, and such persons as may have taken conveyance thereof subsequent to the decree, as well as his representatives, seems to us the only mode in which the relief sought can properly be obtained.

The order must be affirmed.

DANIELS and WESTBROOK, JJ., concurred.

Order affirmed.

SHEPPARD KNAPP AND ANOTHER, EXECUTORS, ETC, RESPONDENTS, v. THE TOWN OF NEWTOWN, APPELLANT.

Statutes — constitutionality of — chapter 483 of 1869 — town bonds — Constitution, Art. 1, § 7.

The legislature has power to require a town to pay bonds issued for a local improvement, though the statute under which they were issued is unconstitutional.

APPEAL from a judgment for plaintiff, entered on a verdict ordered by the court.

Lucien Birdseye, for the appellant.

Robert Sewell, for the respondent.

DANIELS, J.:

By an act of the Legislature of this State, enacted in 1868, three persons were named commissioners, to locate, lay out and construct a highway from Long Island City to Blissville, in the town of Newtown. And it was provided that they should assess the compensation of the owners and occupants of land, over which the highway should be laid out and constructed, for the land used in its construction. It also provided that they should assess one-half the expense of the improvement, upon the real and personal property of the adjoining owners benefited by it, and the other half, upon the taxable real and personal property of the town.*

The town now claims the act to have been unconstitutionally enacted, chiefly for the reason that it provided that the compensation to the landowners, should be determined by the commissioners named in it, instead of being done by a jury, or by commissioners appointed by a court of record, as the Constitution has provided that it shall be done, and the town is probably correct in the position it has taken on this subject.†

But notwithstanding that objection to the validity of the law, the commissioners provided for by it, did proceed under it and procure the land required for the highway mentioned in it, and laid out and constructed it. And they do not appear to have encountered the least resistance or objection to their doing so, either from the owners and occupants of the lands appropriated, or the taxpayers, who, by the terms of that act, were to pay for the land and the expenses of the improvement.

By the act and the proceedings under it, the highway was laid out and constructed just the same as it would have been, if no objection could be taken to the constitutionality of the law. The public derived all the benefit from its provisions that could have been secured from them, if they had provided that the landowners' compensation should be assessed by a jury, or by commissioners appointed by a court of record. And the moral obligation to pay for it, was just as complete as it would be, if the requirements of

* Laws of 1868, vol. 2, chap. 531, §§ 1-3.

† House v. City of Rochester, 15 Barb., 517; Clark v. City of Utica, 18 Id., 451; People v. Haines, 49 N. Y., 587.

the Constitution upon this subject, had been carefully and scrupulously observed.

For that reason, it was within the power, and it was clearly the duty of the legislature, to provide for the payment of the debts incurred in making the improvement, as it was made in conformity to an invalid act previously enacted by its authority. And that was done by the act of 1869. That was enacted in conformity with all the requirements of the Constitution, and none of its provisions are in conflict with that instrument in any respect. By that act, the bonds in suit were provided for, as a means of raising the necessary funds, to pay the expenses of making the improvement. And they were issued by the persons, and in the form prescribed by its terms.* This act was clearly within the powers of the legislature.†

And as long as the town has accepted and acted under the authority it conferred, by issuing the bonds allowed by it, and receiving their proceeds, it cannot now gainsay its liability to fulfill its own part of the obligation created by them.

It was an act passed to relieve the town from what was, at least, a moral duty; that of providing for the payment of the expenses of the improvement, made within its bounds, by immediate taxation. That was allowed to be deferred, and the money in the meantime raised by a loan on the bonds of the town; and, as the privilege was accepted, the burthen, which was its price, must now be borne as its consequence. This act proceeded farther, and confirmed the assessment made by the commissioners, by providing that the bonds should be redeemed with the moneys collected from the assessment then laid by them.

The obligation of the defendant to pay the debt, was further recognized and confirmed by chapter 187, of the Laws of 1871. For, by section 6 of that act, it was provided that all debts, obligations and liabilities of the town, then existing, or which had been authorized or directed by any existing act, should be charged in certain proportions upon the town and Long Island City. And by section 2, of chapter 793, of the Laws of 1872, the supervisor of the

* Vol. 1, Laws of 1869, 1134, § 1.

† Town of Gullford v. Chenango County, 3 Kernan, 143; People v. Flagg, 44 N. Y., 401.

town was authorized to issue bonds to raise money for the payment of all such debts, obligations and liabilities. The bonds in suit were clearly within these provisions, for they had been, within their terms, authorized by an existing act of the legislature.

There can be no room to doubt that the bonds were authorized by an act of the legislature, entirely valid and effectual in its provisions, and the debt created by them has been since sanctioned, on two different occasions, by other acts equally within the authority of that body. It was insisted, upon the argument, that these bonds should have contained the provision, or condition that they were to be redeemed with the moneys collected under the assessment laid by the commissioners; but that objection cannot be maintained, because the statute prescribed just what their form should be; and, by that provision, they were to be made payable in not more than five years from the date of their issue, with interest at the rate of seven per cent, payable semi-annually.*

The bonds were made in that form, and are strictly within the terms of the act, in the obligation they created. The provision made for their redemption by the terms of the act, out of the assessment then laid by the commissioners, was to afford the town the means and source of payment merely, and not to impose a condition on the obligations themselves; and even that was afterward enlarged by the acts of 1871 and 1872, rendering them chargeable, in certain designated proportions, on the town and Long Island City, and conferring upon the town, authority to raise money for their partial payment, in common with its other debts, obligations and liabilities. The defendant offered to prove that the expenses of constructing the road, had been fraudulently increased by the misconduct of those who were engaged in making the improvement; but, as it was not proposed to show that the persons who advanced their money upon the bonds, were, in any way, parties to the fraud, the proof was properly rejected.

It was the wrong of other parties, with whom they were in no sense connected, and over whose acts they had no control whatsoever; and by no just principle, could they be made responsible for the consequences of the fraud. The parties who committed it, should be, themselves, made the subject of prosecution and punish-

* Chapter 483, Laws of 1869, § 1.

ment. Its results cannot be imposed upon innocent persons, who purchased the bonds of the town, without notice of the fraud by which the debt had been improperly enhanced, and advanced their money for them under the belief, warranted by the statute and the act of the town authorities, that they were, in all respects, valid obligations, as upon their face they appeared to be.

It is also claimed that, as the testator purchased the bonds for the price of ninety cents on the dollar, the judgment for their full amount was erroneously directed, because the act of 1869 provided that they should not be sold for less than their par value; but that objection cannot be maintained, because it appears that they were issued to other persons, who sold them to the testator at a discount of ten per cent. What they paid for them was not made to appear. And, without evidence on that subject, it cannot be assumed that they bought them at a less price than the statute permitted them to be sold for.

The judgment recovered, seems to have been entirely warranted by the facts, and it should, therefore, be affirmed, with costs.

DAVIS, P. J., concurred.

Judgment affirmed.

IN THE MATTER OF THE CERTIORARI SUED OUT BY GEORGE
COYLE v. THOMAS D. SHERWOOD AND OTHERS.

Title to office — cannot be inquired into upon certiorari — chapter 588 of 1873.

Upon the application of the relator, a writ of certiorari was issued to review his conviction for assault and battery in the Court of Special Sessions, in the city of New York, on the ground that the respondents, who, acting as police justices, constituted the said court, had no lawful authority to hold the same, the act under which they were appointed being unconstitutional. *Held*, that the police justices, if not such *de jure*, were such *de facto* with color of title, and that their acts must be obeyed and respected, until judgment of ouster be pronounced against them. Having apparent authority to act, and having rendered judgment between the prisoner and the people, neither can, in this collateral way, call in question the title of the judges.

Chapter 588 of the Laws of 1873, entitled "An act to secure better administration in the Police Courts of the city of New York," is constitutional.

CERTIORARI to review the conviction of the relator, in the court of Special Sessions, for assault and battery.

The respondents were, on the 25th of October, 1873, appointed, on nomination by the mayor and confirmation by the board of aldermen, police justices of the city of New York, in pursuance of chapter 538 of the Laws of 1873, and duly qualified as such. On the 14th of February, 1874, the relator was convicted, before them, of assault and battery. The counsel for the prisoner claimed that the court had no jurisdiction, as the act under which the justices were appointed was unconstitutional.

Albert Cardozo and William F. Howe, for the relator.

Benj. K. Phelps, district attorney, for the respondents.

BRADY, J.:

The answer which may properly be made to the points presented on behalf of the relator, is, that the police justices, if not such *de jure*, are such *de facto*, with color of title, and their acts must be obeyed and respected until judgment of ouster is pronounced against them. Having apparent authority to act, and having rendered judgment between the prisoner and the people, neither can, in this collateral way, call in question the title of the judges.

No principle is better settled, than that the acts of such persons are valid when they concern the public. Justice BRONSON said further: "It would be impossible to maintain the supremacy of the laws, if individuals were at liberty, in this collateral manner, to question the authority of those who, in fact, hold public offices."* If the objection were, that, assuming the validity of the tribunal whose acts are questioned, the subject-matter was not within its jurisdiction, the question would be one doubtless for consideration. Such is not the case herein. If, however, the relator were right in presenting his objections in the manner adopted, he is nevertheless not entitled to the relief he demands. The points which are urged by him for our consideration, affecting the title of the justices who

* *The People v. White*, 24 Wend., 525; *Nelson v. The People*, 23 N. Y. Rep., 293.

presided at the Special Sessions, and to the organization of the court in which they sat and pronounced judgment, have recently been under consideration, in the Court of Common Pleas of this county, in an action in the nature of *quo warranto*,* and have been decided adversely to him, by an exhaustive and elaborate opinion delivered by Chief Justice DALY.†

In the conclusion arrived at in that court, we concur. We think the writ should therefore be dismissed.

DANIELS and WESTBROOK, JJ., concurred.

Writ dismissed.

FRANCIS BASSETT, JR., APPELLANT, v. SAMUEL M. LEDERER, RESPONDENT.

Sale of goods by one having no title — when title of true owner divested by — liability of purchaser of — custom — requisites of — new matter constituting defense — must be set up in the answer.

A broker applied to the plaintiff to purchase certain goods, claiming to act for the defendant. Plaintiff agreed to sell them, gave an invoice of them to the broker, and delivered the goods, by his own carman, at the defendant's store, the clerk receiving them giving a receipt, which stated that the goods were received from the plaintiff. The broker, having fraudulently induced the defendant to believe that the goods were his, received from him their full value; *held*, that the plaintiff had not invested the broker with any evidence of title, nor put it in his power to deceive the defendant and induce him to purchase the goods under the belief that they were the broker's property, and that plaintiff could recover of the defendant the purchase-price of the goods.

The person who received the goods and signed the receipt, testified that he did not notice that it stated that the goods were received from the plaintiff. *Held*, that it was negligence, on his part, not to have discovered that fact, and that the consequences of his negligence must be borne by the defendant.

To render a custom or usage of trade valid and binding, it must be known, certain, uniform, reasonable, and not contrary to law.

The defendant was permitted to introduce evidence, to show that the broker's character was good, for honesty and fair dealing. *Held*, that this was error.

* The People ex rel. Edward Hogan v. B. F. Morgan.

† See 5th Daly.

The action was brought to recover the price of the goods sold. The answer consisted of a general denial. *Held*, that the defendant could not introduce evidence to prove that he had paid the broker for the goods.

APPEAL from a judgment recovered on a verdict, and from an order denying a motion for a new trial, made on the minutes of the judge presiding at the circuit.

This action was brought to recover for the value of goods, sold and delivered to the defendant.

A broker, named Westbrook, called upon plaintiff, at his place of business, and inquired for Cabot A muslin, saying he had a customer for some. At a subsequent interview, the broker gave defendant's name as the name of his customer, and asked if Bassett would sell to him, at thirty days' credit. Bassett agreed to do it, and the goods were delivered at defendant's store, and a receipt for them was given to Bassett's carman. An invoice of the goods was also made out and handed to Westbrook, to be delivered to Lederer.

On the same day, Westbrook, who had in fact no authority to act for Lederer, made out an invoice of the goods in his own name, and collected the amount of the goods at a price he agreed upon with Lederer, and gave a receipt therefor, as for a sale made by himself, Lederer believing him to be the owner of the goods. Other facts are stated in the opinion.

W. I. Butler, for the appellant.

Boardman & Boardman, for the respondent.

DANIELS, J. :

As the plaintiff has appealed from both the judgment and the order denying his motion for a new trial, all the questions presented by the case, as well as the exceptions taken, are properly before the court. If upon any ground the plaintiff was improperly defeated in the action, a new trial must therefore be directed in his favor.

The action was brought to recover the price of goods, sold and delivered by the plaintiff to the defendant. The sale was made through the intervention of an agent, acting as a broker. The uncontroverted evidence given upon the trial, tends to show that the

broker applied to the plaintiff for the purchase of the goods, representing that he had a customer who wanted them, and, finally, named the defendant as the person ; that the plaintiff agreed to sell the goods to him, and he afterwards sent them to his store by a carman in the plaintiff's employment, who delivered them there and took a receipt for them from the person there receiving them for the defendant. The person who signed the receipt, was in the habit of doing almost everything done in the store, and receiving and receipting for goods. Under this description of his duties, which was given by himself, no difficulty can exist in the way of presuming that he was so far empowered to act for the defendant, as to be authorized to bind him by signing receipts for goods delivered at the store, in his behalf. This was apparently his authority, from the nature and character of his employment ; and persons transacting business at the store, had the right to presume that the fact, in that respect, corresponded with the existing indications of it.

This receipt contained the statement on its face that the goods received were from the plaintiff, and they were marked for the defendant. The person receiving the goods, and who signed the receipt for them, was the defendant's brother. In his testimony, he stated that he did not notice that portion of the receipt which contained the statement that the goods were from the plaintiff. But even though he failed to do that, as the statement accompanied the goods, and was sent with them by the plaintiff for the purpose of showing the defendant, or the person in his employment receiving them in his behalf, that they were from the plaintiff, it was notice of the existence of the fact. And the circumstances that the defendant's clerk neglected to so far notice the contents of the receipt, as to discover the statement made on that subject, cannot be permitted to prejudice the plaintiff's demand. He discharged his duty, so far as it concerned that act, by sending the notice with the goods, and causing it to be presented to the person receiving them for the defendant, at the time of their delivery. That was the natural, as well as ordinary, form which would be expected to be given to such an instrument, attending a transaction like that, which occurred when the goods were delivered. A receipt, merely stating that the goods themselves were received,

without any mention of the person sending them, would be of so incomplete and indefinite a nature, as to be of but little use in the transaction of mercantile, or even any other description of business. Such instruments might as well be omitted as preserved, so far as any real, permanent, practical benefit could be expected to be secured from them. The habits and course of business sanction the use of the form adopted, as evidence that the plaintiff delivered these goods to the defendant; and a moment's reflection would have satisfied the person actually receiving them for him, that information of that fact would probably be found in it. He was negligent in not examining the receipt and discovering the fact. The consequences of that negligence, so far as they may prove important in this case, as he was the defendant's servant, must be borne by him, and not by the plaintiff. By the acts which were performed, the notice was brought immediately under his observation, and he failed to discover it by, simply, inattention; and that, too, when the nature of the business and the purposes of the receipt, led directly to the conclusion that the name of the person, from whom the goods came, would be found in it, as a portion of its ordinary and appropriate contents. Other persons, in the transaction of their own business, may have often been equally careless, but, if the fact were so, it would form no protection for the defendant against the direct consequences of such an omission.

If a reasonable degree of attention had been given to the contents of the receipt, by the person who received the goods and signed it, the fact would have been at once discovered that they came from the plaintiff, and that would have suggested the probability that he, and not the broker, was the vendor in the sale made of them. That would have been enough to stimulate such an inquiry into the truth of the business, as, in the end, would have operated as a full protection against the broker's fraudulent devices. Having such means at hand for the discovery of the truth, and neglecting to make use of them, is attended with the same legal results, as the knowledge which a proper investigation would have secured; and that would have deprived the defendant of all pretense that he was a *bona fide* purchaser of the goods from the broker as their vendor. The rule laid down by the chancellor, is, that "whenever the purchaser has sufficient to put him on inquiry, he

is in equity considered as having notice; and in such a case will not be deemed a *bona fide* purchaser." * And that principle, as one of general application, was maintained afterwards in *Williamson v. Brown*.† And for that purpose, placing knowledge of the fact under the immediate observation of the defendant's clerk, as it was, when the receipt was presented to him for his signature, as a portion of the transaction in which he was acting for his principal, was in legal effect the same, so far as the latter is concerned, as though he, himself, and not his agent, had acted in the business. There is no difference between personal and constructive notice, when the latter results from the transaction in which the agent is acting for his principal.‡ That this receipt might reasonably have been supposed to contain a statement of the name of the person selling the goods, is shown by the evidence which the defendant himself gave as a witness in his own behalf; for he testified that receipts given on the delivery of goods, generally state from whom they come.

After the terms of the sale had been agreed upon between the plaintiff, and the broker, acting, as it was supposed by the former, for the defendant, he delivered an invoice to the broker, stating their sale by the plaintiff to the defendant, and the goods, themselves, with the receipt to be taken, to his own carman, to be delivered to the defendant. Nothing whatever was delivered to the broker by the plaintiff, showing him to have any interest in, or right of disposition over, the goods. He did not put it in the broker's power to deceive the defendant, and induce him to purchase the goods under the belief that they were the broker's property. On the contrary, he took every reasonable precaution to avoid the possibility of deception in that respect; for he withheld the possession from the broker, sent them to the purchaser by his own agent, with a receipt to be taken showing the source from which they came. He could have, reasonably, been expected to have done nothing more, unless it might be, to have sent the invoice by the same hand that carried the receipt. And the omission to do that cannot change his rights, because it did not supply the broker with any indication of title to the property in himself

* *Pendleton v. Fay*, 3 Paige, 205.

† 15 N. Y., 354.

‡ *Bank of U. S. v. Davis*, 3 Hill, 453, 461.

Under these circumstances, the broker was invested with nothing by the plaintiff, indicating him to be the owner of the goods. And, consequently, he had no evidence of title, on which the defendant could rely to the plaintiff's prejudice. He was in no condition to sell the property as his own, and transfer the title to it as such. Such a sale could divest none of the plaintiff's rights in the property, or its price.* These cases maintain the rule, so often asserted in the books, that the lawful owner cannot be deprived of his property, by the act of a person wrongfully making sale of it, where he has done nothing that can properly lead the purchaser into the belief that the person he may deal with, has the right to transfer its title.

The only authority which the plaintiff gave to the broker, over the goods, was the right to sell them as a broker. And it appears, from the defendant's own statement as a witness, that he knew Westbrook as a broker and merchant generally. He should have inferred, from the circumstance that he came to make the sale without having possession of the property he proposed to sell, that he was then acting as a broker and not as a merchant. That was the mode in which brokers ordinarily made sales, and it was sufficient to charge the defendant with knowledge that he was then apparently proposing a sale in that capacity. The fact that he represented himself to be the actual owner, cannot protect the defendant, as long as the plaintiff had conferred upon him no colorable authority, to make such a representation. And the case in favor of the plaintiff, can be in no way changed by the circumstance that the broker artfully contrived to be present when the cartman unloaded the goods, and then professed to have made the delivery of them himself. As long as the plaintiff did not empower him to deceive the defendant by his professions and artifices, he cannot be rendered responsible for their consequences. He simply authorized the broker to sell in that capacity, and as he was known to the defendant to be a broker, and had, in reality, no possession of the property he offered for sale, the purchase must be held to have been made in that and no other way. So far, the plaintiff was bound by his acts, and no farther. And as the

**Salts v. Everett*, 20 Wend., 267; *Ballard v. Sampson*, 47 Barb., 646; *Id.*, 40 N. Y., 314; *Sprights v. Hawley*, 39 N. Y., 441.

defendant secured a title to the goods through his interposition in that capacity, the transfer was attended with the ordinary results of purchases made in that way. Though professing to act for himself, he really acted for the plaintiff, under such circumstances as rendered the sale which was made, the sale of the plaintiff, through Westbrook, as his broker. And that, as long as no rescission of the sale was ever attempted, created such a privity between the parties to the action, as entitled the plaintiff to the price of the goods sold.*

During the progress of the trial, evidence was given, from which it was claimed by the defendant, that a custom existed at the time when the sale was made, which authorized him to make payment of the purchase-price of the goods, to the broker; and that, having made such payment, the plaintiff could not recover. Ordinarily, the broker, whose only authority is to sell, has no such power, and to supply that defect, the evidence of usage was given.

It is not necessary to decide whether a custom, established by such a usage, would be valid or not, because the proof given upon the trial, falls very far short of maintaining its existence. To render a custom, or usage of trade, valid and binding, it must be known, certain, uniform, reasonable, and not contrary to law.† The evidence given, failed to show that the usage relied upon, was either known, certain or uniform; indeed, it showed the precise converse to be the truth.

The evidence of the defendant himself, is about as significant as any, in the exhibition of these defects; and, as he was extensively engaged in the business, and testifying in his own behalf, it may well be presumed that his statement, upon this subject would be as favorable as the facts would warrant him in making it. He said that he knew "a great many transactions that have been made through brokers, where they sent the bills in their own name to the amount of hundreds of thousands of dollars; goods delivered

*Taintor v. Prendergast, 3 Hill, 72; Dunn v. Wright, 51 Barb., 244; Higgins v. Moore, 84 N. Y., 417.

† 2 Greenleaf's Ev., §§ 251, 252; Parsons on Con., 2d ed., 53; Sipperly v. Stewart, 50 Barb., 62; Barnard v. Kellogg, 10 Wallace, 388; Chenery v. Goodrich, 106 Mass., 586; South-western Freight Co. v. Stanard, 44 Missouri, 71; Walls v. Bailey, 49 N. Y., 464.)

by another party, bill sent by the broker, and the party receiving the goods not knowing anything about where they came from except from the bill, and did not care; at least I am one that did not." On his cross-examination, he added, he did not know whether the broker was authorized by the seller to receive the pay or not. McCune said that brokers sold and received pay in their own names, at times, and that was the custom of the establishment, he was treasurer and secretary of. On his cross-examination, he stated that he said it was only done in some instances, and did not say it was a general custom. Scott said that he had bought goods that way, but did not know whether the seller specially authorized the broker to receive payment or not. He knew that brokers did it, and it was common for them to sell in their own name; but he stated that he did not say it was the practice of brokers to collect the money. Wright testified that there was no general custom to that effect; that he never collected the payment, only when he was specially authorized. Cushman, at first, stated that it was always customary for brokers to sell in their own names and receive payment of the price, but afterwards added that he did not know what the custom was, but it was often done at the time of the sale in controversy. Huichman said there was such a custom, but qualified this answer, by saying that he knew *he* did it and thought brokers did. When he did it, he said it was the arrangement between him and his employer. Douglas said about the same. He spoke only from his own observation, and acted in that way by the special authority of his employer. This is the substance of all the evidence, given for the purpose of establishing the custom relied upon, and it is clear that it is too vague, uncertain and casual, to be attended with such a result as was given to it on the trial.

The court also permitted the defendant to show that Westbrook's character was good for honesty and fair dealing. To the admission of this evidence, the plaintiff excepted. And several witnesses stated it to be good. This ruling cannot be sustained. It is opposed to the rule, as settled in this State, defining the cases in which evidence of this description can be received. This is not a case in which such evidence can be taken.*

*Gough v. Herring, 16 Wend., 646; vol. 1, Phillips' Evidence, 8d ed., 406, 407
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The complaint stated that the defendant had not paid the plaintiff the price of the goods sold, nor any part of it, and that the defendant was indebted to the plaintiff in the amount claimed. The answer consisted of a general denial. Under this issue, the defendant was allowed to prove that he had paid Westbrook, the broker, for the goods. And the plaintiff excepted to the ruling, permitting that evidence to be given. The exception was well taken, as the rule upon this subject has been heretofore maintained.* The judgment and order should be reversed and a new trial ordered, with costs to abide the event.

BRADY, P. J., and WESTBROOK, J., concurred.

Judgment and order reversed, and new trial ordered; costs to abide the event.

ALBERT S. GALLUP AND OTHERS v. SAMUEL M. LEDERER.

Fraudulent sale — agent — private instructions to — custom — evidence of.

A broker applied to the plaintiff to purchase certain goods, claiming to act for the defendant. The plaintiff agreed to sell them, gave an invoice of them to the broker, made out in defendant's name, and delivered the goods, by his own carman, at the defendant's store, the clerk receiving them giving a receipt, which stated that the goods were received from the plaintiff. The broker, having fraudulently induced the defendant to believe that the goods were his, received from him their full value. *Held*, that the plaintiffs had not invested the broker with any evidence of title, nor put it in his power to deceive the defendant and induce him to purchase the goods under the belief that they were the broker's property, and that plaintiffs could recover of the defendant, the purchase-price of the goods.

Defendant, after testifying that any boy or salesman at the door would receipt for the number of packages received, was asked, whether he ever authorized any clerk to sign a receipt, stating who the owner of the goods was; *held*, that the evidence was properly excluded; that from defendant's own statement, the person receiving the goods, appeared to be authorized to sign the receipt; and that no private instruction, not communicated to the other party, was admissible for the purpose of qualifying this authority.

Defendant proposed to prove that it was a custom among merchants, to sign the receipts presented by carmen with goods, without any inquiry, on the part of the

* Van Giesen v. Van Giesen, 6 Seld., 316; McKyring v. Bull, 16 N. Y., 297.

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receiving clerk or porter, as to the ownership of the goods, or the place from which they were received. *Held*, that the evidence was properly excluded; that the custom proposed to be proved, was entirely unreasonable, as it placed the consequence of one person's negligence and inattention upon another in no way connected with him, having no control over his conduct, and for whose acts he could be in no proper sense responsible.

Defendant was asked whether, at the time of the sale, there was a custom among brokers to sell goods in their own name and receive pay therefor. *Held*, that the evidence was properly excluded. It was not proposed to prove a general custom upon that subject, but simply a custom of brokers, which might very well be unknown to all other persons.

To render a custom valid and binding upon a party to a transaction included within it, the proof should show it of such long continuance, or general application, as reasonably to warrant the conclusion that it was known to the party designed to be affected by it, or that he had actual knowledge or notice of its existence.

Where a custom is to be proved, the inquiry is not after the opinions of traders and merchants in respect to the law upon a mercantile transaction, but for the evidence of a fact, to wit, the usage or practice, in the course of mercantile business, in the particular case.

Defendant purchased and received the goods at thirty cents per yard. The court charged the jury that the plaintiff was entitled to recover the market value of the goods at the time they were demanded of the defendant. *Held*, that this was error; that the broker was authorized to sell, and the action was to recover upon the sale made, and, in theory, it affirmed the sale and bound the plaintiff by its terms.

MOTION by defendant for a new trial, on exceptions ordered to be heard, in the first instance, at the General Term.

Plaintiffs were manufacturers of bleached sheetings, and William E. Churchill was one of their agents in New York.

In August, 1866, one Westbrook, a broker, called upon Churchill and stated that he wanted fifteen cases of Arkwright sheetings, for a first-rate party, and asked the price. The price was agreed upon, and seven cases of the goods were delivered to the defendant on the ninth of August, and a receipt, signed by one of his clerks, was taken by Churchill's carman. Westbrook assumed to act as the agent of the supposed purchaser. An invoice was made out to Lederer, calling for payment in thirty days, and delivered to Westbrook. On the same day, Westbrook, who had, in fact, no authority to act for Lederer, made out an invoice of the goods in his own name, and collected the amount of the goods at a price he agreed upon with Lederer, and gave a receipt therefor as for a sale

made by himself, Lederer believing him to be the owner of the goods.

At the trial, the court directed a verdict for the plaintiff, and ordered the exceptions to be heard, in the first instance, at the General Term.

Boardman & Boardman, for the defendant.

W. I. Butler, for the plaintiff.

DANIELS, J. :

This action arose out of a similar transaction, to that involved in the case already considered between Bassett and the present defendant.* So far as the legal rights of the parties are concerned, no necessity exists for a re-examination of them. They must be determined according to the disposition of the other case. But in this case, evidence was excluded, which, the court, in the other, allowed to be given, and a verdict was directed for the plaintiffs for the value of the goods sold, instead of the price at which the defendant purchased them. The defendant testified that Westbrook acted as the broker in purchasing the goods, and that any boy or salesman at the door, would receipt for the number of packages received. It appeared also that the receipts given for the goods, sent to the defendant's store by the plaintiff's agent, stated them to have been received from him. The defendant, after that, was asked whether he ever authorized any clerk to sign a receipt, stating who the owner of the goods was. This was excluded on the plaintiff's objection, and the defendant excepted. As the receipt, stating from whom the goods came, was in the form commonly used in business transactions, the admission of this evidence would have been of no service to the defendant, for the persons receiving the goods, appeared, by the defendant's own statement, to be authorized to sign the receipt of the carman who brought them, and no private restriction, not communicated to the other party to the transaction, was admissible for the purpose of qualifying the authority, which appeared to be ample for the purpose the business required.†

* See *ante*, p. 282.

† 1 Parsons on Con., 2d ed., 40-42 ; Story on Agency, 4th ed., §§ 73, 126, 127.

The offer to prove the preceding dealings between the broker, Westbrook, and the defendant, was very properly overruled. Those dealings had no possible connection with the transaction in controversy, and the plaintiff was in no way concerned in them. They could not be considered as affecting his rights, and were entirely irrelevant to the case. Even though they may have been just and fair in all respects, they could afford no protection to the defendant against the plaintiff's demand, when that proved to be well founded by the facts and circumstances constituting the transaction out of which it arose.

The custom offered to be shown, that merchants sent invoices with goods sold at the time of their delivery, stating the names of the vendor and vendee, the quantity, numbers, packages and prices of the goods, could have no effect upon the rights and obligations of the parties, even if it had been received. For, as the plaintiff did nothing which could be construed or received as an indication that the goods were owned by the broker, he could not be deprived of his property in them, or his right to the price for which they were purchased by the defendant, although the invoice delivered to the broker, was fraudulently suppressed by him, and for that reason, never exhibited to the defendant. The sale was made by a person known to the defendant to be a merchandise broker and speculator; and, as the goods were never placed in his possession by the plaintiff, the defendant should have ascertained that circumstance and inferred from it, that he acted simply as a broker in the transaction, and not as a merchant selling his own property. The fact that the broker deceived him, and, on account of such deception, he failed to discover the true relation he sustained to the business, was no fault of the plaintiff, since it was practiced without his authority or knowledge, and he did nothing to render the deceit successful.

The custom proposed to be proven, that merchants signed the receipts, presented by cartmen with goods, without any inquiry on the part of the receiving clerk or porter, as to the ownership of the goods, or the place from which they were received, was entirely unreasonable, because it placed the consequences of one person's negligence and inattention, upon another in no way connected with him, having no control over his conduct, and for whose acts, he

could be in no proper sense responsible. A custom, tolerating carelessness and inattention in the ordinary affairs of business, would be inconsistent with the legal, as well as social duties, which one person in those affairs, owes to another. It would be not only unreasonable, but opposed to well-settled legal obligations, to maintain the validity of a custom like that the defendant proposed to prove upon this subject. In the same line of defense, the defendant was asked, whether, at the time of the sale, there was a custom of brokers to sell goods in their own name and to receive pay therefor. This inquiry was excluded by the court, and the defendant's counsel excepted. If a custom, sanctioning such a course of conduct on the part of brokers, would be valid, the inquiry was not broad enough, to render the proof admissible; for it might very well have been so restricted, as to time and persons, as to afford no grounds for supposing the plaintiff to have had any notice or knowledge of its existence. The defendant did not propose to prove a general custom upon that subject, but simply a custom of brokers, which might very well be unknown to all other persons. To render a custom valid and binding upon a party to a transaction included within it, the proof should show, or propose to show, it of such long continuance, or general application, as reasonably to warrant the conclusion that it was known to the party designed to be affected by it, or that he had actual knowledge or notice of its existence.* This, as well as the other offers of proof of custom, were plainly defective in this respect, and for that reason properly excluded.

The effect of such a custom, so far as it extended, would be to abrogate an existing, well-established principle of law, designed for the protection of persons selling their property through the agency of brokers; and nothing less than actual or presumed assent to its application, should be allowed to render it obligatory.† To prove the existence of a custom, something more than the

* Vol. 2, Cowen & Hill's Notes to Phillips' Evidence, 3d ed., 508, 509; *Southwestern Freight Co. v. Stanard*, 44 Missouri, 71, 82; *Sipperly v. Stewart*, 60 Barb., 63; *Walls v. Bailey*, 49 N. Y., 464.

† *Rogers v. Mechanics' Ina. Co.*, 1 Story's Rep., 608; 2 Cowen & Hill's Notes, 8d ed., 508, 509; *Higgins v. Moore*, 84 N. Y., 417; *Barnard v. Kellogg*, 10 Wallace, 383, and cases above cited.

judgment or conclusion of the witness, called to support it, is required. A custom is the result of usage, and can only be properly shown, by proof of the usage from which it may be claimed to be derived. The inquiry in such cases is not after the opinions of traders and merchants, in respect to the law upon a mercantile question, but for the evidence of a fact, to wit, the usage or practice in the course of mercantile business in the particular case. * The inquiry made of the witness, was properly excluded, for the additional reason that it required him to give his conclusion, instead of detailing the facts which might sustain that conclusion.

The exceptions taken to the other evidence excluded, are so clearly untenable, as to require no consideration. It was evidently improper to allow the defendant to construe the receipt or determine its effect, by answering whether it afforded any indication of the ownership of the goods; neither could it have been proper to show that purchasers allowed their goods to remain in warehouses, undelivered, until the title to them had passed through various other persons. Such a practice had no relevancy, whatever, to the transaction upon trial.

The court charged the jury, that the plaintiff was entitled to recover the market value of the goods, at the time when they were demanded from the defendant. To this direction, the defendant excepted. That value was shown to be from thirty-two to thirty-five cents per yard; while they were purchased and received by the defendant, for the price of thirty cents per yard. The broker was authorized to sell, and the action was to recover upon the sale made. In theory it affirmed the sale and bound the plaintiff by its terms. This direction was therefore improper, so far as it permitted the plaintiff to recover a greater price than that for which the goods were purchased by the defendant. For that reason, the verdict must be set aside and a new trial ordered, with costs to abide the event, unless the plaintiff shall, within twenty days after notice of this decision, stipulate to reduce the verdict to the amount due the plaintiff, at the price of thirty cents per yard, as of the date when it was rendered. In which event, the motion will be denied,

* *Allen v. Merchants' Bank*, 23 Wend., 215, 223; *Rogers v. Mechanics' Ins Co.*, 1 Story's Rep., 603, 607, 608; *Lewis v. Marshall*, 7 Man. & Grang., 729.

and the plaintiff have judgment upon the verdict, without costs of the present motion.

BRADY, P. J., and WESTBROOK, J., concurred.

Ordered accordingly.

JOHN H. LESTER, RESPONDENT, v. THE UNION MANUFACTURING CO., APPELLANT.

Contract—disaffirmance of decree—payment—Confederate money—tender.

A dispute having arisen as to the price at which plaintiff had sold certain property to defendant, an agreement was entered into at Richmond, Va., in 1863, by which the defendant was to pay, and the plaintiff to receive, \$50,000 in full settlement of all claims and demands, in fulfillment of which, a check was drawn upon a bank in Richmond, Va., and the same was, upon presentation by the plaintiff, paid to him in Confederate bills. It appeared from the evidence that the settlement and the mode of payment were all parts of one transaction. This action was brought by the plaintiff, without having tendered repayment of the money, to recover upon the settlement, he claiming that the payment was void on account of duress. *Held*, that the complaint should have been dismissed: that the court could not affirm one part of the transaction and disaffirm another part.

It appearing from the evidence that the only kind of money used in the banks at Richmond, at that time, was Confederate bills, and that all checks made payable at those banks were payable in those bills, *held*, that the debt created by the contract was payable in Confederate money, and that payment in such money was valid.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial, made on the minutes of the judge presiding at the trial, and also from an order denying a motion for a new trial on the ground of surprise and newly-discovered evidence.

The complaint alleged that the defendant purchased from plaintiff, machinery and personal property, of the value of \$82,888.37, December 1, 1863, and agreed to pay that sum therefor, in the stock of the company; and that afterward, and on December 18, 1863, the plaintiff and defendant had an accounting and settlement, by which the defendant agreed to pay him \$50,000 in cash, instead

of said stock, which was reduced to writing, and is exhibit "A," referred to in the opinion. That plaintiff was afterward compelled, in the same month, by duress, to take Confederate notes for the said \$50,000, which were of no value whatever. The answer admitted the settlement, but denied that any force or duress was used to compel the plaintiff to take the Confederate notes.

The duress, which was attempted to be proved upon the trial, was, that the plaintiff would, if he remained in Richmond, be forced into the Confederate ranks, and that he would not be allowed to leave the city, unless he made the settlement and received payment of the check in Confederate notes.

The complaint in the action was twice amended.

Wm. A. Courson, for the appellant.

E. Pierrepont, for the respondent.

DOMONUE, J.:

This suit, as the last amendment of the complaint stated, is brought to recover on an agreement, entered into as a compromise of the value claimed for certain articles sold the defendants.

That complaint alleges that the plaintiff had sold the property for \$82,000, payable as stated; that thereafter, on a settlement and accounting, defendant agreed to pay plaintiff \$50,000 in cash; that after that accounting, the agreement "A" was, by force and fraud, obtained from plaintiff, and that by force and fraud, he was compelled to take Confederate money for the amount, and has never been paid his \$50,000. While there is conflict on some points, as there will be in all cases, these are the main points in the case, on which there is no dispute. It is clear that there was a suit pending in Richmond, where all these transactions took place, in favor of plaintiff against defendants, for the purchase-money of this property, the plaintiff and defendant widely differing in their statements. That about the time of the sale, sued on, the plaintiff, if he is to be believed, was afraid he would be drafted into the Confederate service. That on that state of the facts, the arrangements, all made at the same time and under the same state of facts, whatever they were, of the sale

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and mode of payment, were entered into. The plaintiff himself distinctly testifies: "He said I could take my choice, *either execute that contract* or I would be compelled to remain there." Again, "He said if I attempted to leave *without executing the contract*, receiving this check, and drawing Confederate notes, I would not be permitted to leave the Confederacy." His whole evidence is clear, that the whole transaction, from the agreement of settlement to how it was to be paid, was one. The plaintiff now seeks to offer the contract, on which he sues, and which he puts in evidence as his case, and disaffirm the payment. In this, I think the plaintiff is in error, and the learned judge, when he rested, should have dismissed his complaint. He cannot affirm in part and avoid in part, the one transaction. But supposing he could affirm the sale and disaffirm the payment, in case the payment is not good, how does he then stand? In considering this question, it is necessary to take into account the place and time in which the parties were acting, and the situation is too well known to need repetition. What was then there currency, and in what did he expect to be paid, and what was a payment?

First, if nothing had been said, what did he expect? He is asked: "Q. What were checks payable in, at that time, in Richmond? A. I think they were all payable in Confederate bills."

"Q. Do you not know that was the case? A. Yes, sir, unless they were drawn otherwise."

The check was handed to him, and he further testifies, he has no doubt that it was so payable, and, he expressly testifies he got what he expected—Confederate money. It is hardly worth while to follow the evidence in the case, to show that the debt, created by the contract, was payable in Confederate money, and that such would be a good payment. 16 Wallace, 414; 50 N. Y., page 638; and 52 id., page 31, seem to be conclusive on this point. This being the state of affairs at the time and place of the payment, how can the plaintiff disaffirm such a payment on the ground that it was forced on him? A very careful examination has not shown me any case or principle, in which it is announced that the coercing or compelling a man to take payment of his

debt, when due, is open to disaffirmance, and that the debtor can be compelled to pay again. It would be useless to cite authorities to show that, on such a tender, if the plaintiff had not accepted it, and the defendant had kept it good, and had the money which he then tendered, to hand over, the plaintiff could not recover.

As the plaintiff has the identical money, the tender, if viewed in the light only of a tender, is sufficient to defeat this claim.

But was there such a duress here as the plaintiff may disaffirm either the contract or the payment? Suppose it to be established by the plaintiff's proof, that he wanted to get out of the Confederacy, and was afraid that if he did not settle this he could not, it does not seem to me there is any evidence that the defendants or their servants told him any falsehood or made any misrepresentation to him about the facts; and there results only this, that as matters existed at that time, in Richmond, he had not by any coercion these parties could use, but by the disturbed state of affairs, to settle, to avoid, not the trouble the defendants might give him, but what others might do if he was found there.*

Another equally fatal ground seems to be against the plaintiff; he has kept and retained what he received for these goods, and, for aught that appears, he or his family have used it, and yet expect to be able to obtain the money here.

The court, on the trial, when asked, should have dismissed the complaint. The judgment should be reversed and new trial ordered, costs to abide the event.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment reversed and new trial ordered, costs to abide the event.

* U. S. v. Huckabee, 16 Wallace, 414.

IN THE MATTER OF THE APPLICATION OF HENRY W. GENET
FOR A MANDAMUS TO THE COURT OF OYER AND TERMINER.

Bill of exceptions — criminal when fugitive from justice — not entitled to have exceptions taken reviewed.

A person, convicted of a crime, who escapes from custody before sentence, and flees the jurisdiction of the court, thereby waives and suspends his rights to have exceptions, taken on the trial, reviewed by the appellate court, and such waiver and suspension can be avoided by him only by returning to the custody and judgment of the law.

Such criminal cannot demand, as matter of right, the statutory benefits conferred on those who submit to the jurisdiction and judgment of the courts.

A party, in contempt of court, will not be permitted to ask a favor of the court, nor to take any aggressive proceedings against his adversary.

APPLICATION for a mandamus to the Court of Oyer and Terminer.

Henry W. Genet was convicted of felony at the Court of Oyer and Terminer, in December, 1873. While in custody, awaiting the decision upon an application for the settlement of a bill of exceptions, and before sentence, he escaped, and was, at the time of this application, a fugitive from justice.

The applicant moved, at the General Term, for a writ of mandamus, directing the justice who presided at the Oyer and Terminer, on the trial of the indictment, to proceed with the settlement of the bill of exceptions, and to sign and seal the same when settled; the justice having refused to do so on the ground that, Genet being at large, a fugitive from justice, and without the jurisdiction of the court, public policy required that he should not be allowed to conduct such proceedings by his counsel.

Wm. A. Beach, for the motion.

B. K. Phelps, district attorney, opposed.

DAVIS, J.:

The applicant, Henry W. Genet, was convicted of felony at the last December term of the Oyer and Terminer, and, upon such conviction, was committed to custody, to await sentence, pending

an application for the settlement of a bill of exceptions. Before that application was disposed of, or sentence pronounced, he escaped from custody, and has since been a fugitive from the State. The bill of exceptions prepared on his behalf, with the amendments proposed thereto by the district attorney, were presented to the court for settlement. The court declined to proceed with and complete the settlement of the proposed bill, on the ground that the defendant was, and is still; "a fugitive at large and beyond the control and without the power of the authorities of this State, he having made his escape and absconded from their custody after his conviction, while awaiting the action of the court upon it." The applicant now moves the General Term for a writ of mandamus, directing the justice, who presided at the Oyer and Terminer on the trial of the indictment, to proceed with the settlement of the bill, and to sign and seal the same when settled. The reasons assigned by the learned judge, before whom the applicant was tried, for refusing to settle the bill, commend themselves to our judgment. He says: "My conviction is, that, while the defendant is at large as a fugitive beyond the reach and control of the authorities of this State, public policy requires that he should not be allowed to carry on any proceedings in its courts, of the nature of that now proposed on his part by his counsel. Before that should be allowed, he should return and surrender himself to the custody of the proper authorities. Then he will be entitled to all the advantages provided by the laws of the State for the review of criminal convictions. But until that be done, the authorities he has defied by his escape, should decline to interfere in his behalf, by the way of placing his case in a shape to have it examined or reviewed. If that course be not adopted, then some encouragement will be afforded by the proceeding which may be authorized, that will operate as an inducement to offenders, after conviction, to escape from custody; because they will then be able to defy the authorities, and, at the same time, require them to act in their behalf, so far as to afford them an opportunity of judging whether they may most safely return or continue to remain away."

It will be observed that the learned judge put his decision upon grounds of public policy. In this, he is sustained by authority.

In a case reported in 31 Maine,* it is stated that the "defendant had been tried and convicted upon an indictment for an aggravated offense. He excepted, and was committed for want of sureties to appear at the law term at which the exceptions were to be heard. Meanwhile he escaped. His counsel proposed to argue the exceptions, but the court declined to hear the case until the defendant should be again in custody."

In *Commonwealth v. Andrews*,† the defendant was found guilty, and alleged exceptions, which were allowed, and which he was held in jail to prosecute. The case being called in the Supreme Judicial Court, the Attorney-General suggested that the defendant had broken jail and was at large, and asked that he should be defaulted and the exceptions overruled, without argument. The counsel for the defendant admitted the escape, but argued that he was entitled to a hearing on the exceptions, in defendant's behalf; that the defendant's *status*, at the time of the allowance of the exceptions, was alone to be considered by the court in passing on them; that by his escape he had committed a crime, for which he was liable in a separate proceeding; and that to deprive him of a hearing on exceptions, in another and different proceeding, would be to inflict a punishment for his escape, in derogation of his constitutional rights. The court, BIGELOW, C. J., pronouncing the opinion, overruled the several points taken by the defendant's counsel, and held, that, so far as the defendant had any right to be heard under the Constitution, he must be deemed to have waived it by escaping from custody and failing to appear and prosecute his exceptions in person, according to the order of the court under which he was committed. The defendant was, thereupon, defaulted, and his exceptions overruled. That case goes farther than we are called upon to go, in upholding the decision of the Oyer and Terminer; for the court defaulted the defendant, because of his escape, and overruled his exceptions, thus putting him in position where he could not be heard, as matter of right, upon his return to custody. In the case at bar, the judge has simply suspended proceedings till the return to custody of the defendant. He has adopted the suggestion of a learned writer

* Page 592.

† 97 Mass., 543.

on criminal procedure, who says: "If, however, the prisoner has absconded, or is in a position analogous to what is termed being in contempt, it will be highly judicious for the court to decline hearing even a mere legal argument in his absence." * It is well settled that a party may waive a statutory right, and, in some instances, rights secured to him by the Constitution.† This he may do as well by his acts as by any formal solemnity. The statute gives to a party, convicted of any crime, the right to have errors of law, committed on his trial, corrected on bill of exceptions.‡ But such bill of exceptions is not to stay or delay the rendering of judgment, or the execution of such judgment, except as specially provided by statute. § Our system for the review of convictions and judgments in criminal cases, was not known to the common law, but was created by statute, in relaxation of the rigors of the common law, and for the protection of persons, accused of crime, against illegal convictions. It is based altogether upon the idea that the party, who alleges an erroneous conviction, which he seeks to correct, will hold himself amenable to the judgment of the court of review, to whose supervising justice he appeals. He is at liberty at all times to waive or abandon his proceedings, and this he may do by some formal step in the courts, or by acts which place him beyond the jurisdiction of the courts, and out of the custody of the law. In all criminal cases where the judgment of imprisonment is to be pronounced, the defendant must be present in person to receive sentence.¶ "Judgment cannot be given against any man in his absence for a corporal punishment." ¶ A convict, who escapes from custody before judgment, and flees the jurisdiction of the court, puts himself in a position to prevent judgment in a court of review, if adverse to him, and to render it nugatory, if in his favor; for the court can pronounce no judgment of corporal punishment without his actual presence, nor can it order a new trial which will be effectual, without his voluntary choosing to return and submit to it. We think no person who stands convicted of crime, can

* 1 Bishop on Criminal Procedure, § 277, p. 166.

‡ 2 R. S., 736, § 21.

† Buel v. Lockport, 8 Coms., 197; Peo. v. Cancemi, 16 N.Y., 501. § Idem, § 22.

§ 1 Chitty Cr. Law, 163; Reg. v. Caudwill, 17; Q. B., 508.

¶ C. J. Holt, in Duke's Case, Holt, 899.

thus, by committing another offense, make himself master of the situation, and, at the same time, command and defy the judgment of the courts. The true ground, as it seems to us, is to hold that his conduct has, for the time being, waived or suspended his rights, whatever they may be, and that the waiver or suspension can be avoided by him, only by returning to the custody and judgment of the law. The process of outlawry at common law, against an escaped prisoner, put the criminal in a position where he could not be heard to assert any claim of right, until the judgment of outlawry was reversed or set aside. We have abolished that proceeding by statute, but it does not follow that the convict, who outlaws himself by escaping from custody, can demand, as matter of right, at the hands of the court, the statutory benefits conferred on them who submit to the jurisdiction and judgment of the courts.

The Court of Oyer and Terminer was, we think, justified in refusing to proceed with the bill, because the proceedings would be nugatory. No writ of error will lie to bring the bill of exceptions before this court till after judgment shall be pronounced. The defendant is preventing judgment by his unlawful acts; and, while his misconduct keeps the case in that position, the court owes him no duty, to perform, on his behalf, an act which he, himself, renders wholly unavailing. The bill, if settled, could not be brought up on certiorari, without the stay of judgment provided for by statute; and no judge would be bound, or likely to grant a certificate of probable cause, while the defendant was maintaining a practical stay of all proceedings against him, by his flight from justice. It is insisted by the learned counsel for the defendant, that Genet can only be deemed to be and treated as in contempt of court, and that the rule that one in contempt will not be heard, applies only to matters of favor, and that, though adjudged to be in contempt, the party will be heard on matters of strict right, and is entitled to be heard, if his object is to get rid of the order or other proceedings which placed him in contempt. But the true rule, even in such a case, is that stated by FOLGER, J., in *Brinkley v. Brinkley*,* "that a party in contempt, and until he is purged of it, will not be permitted to ask a favor

*47 N. Y., 49.

of the court *nor to take any aggressive proceedings against his adversary*; but that it is his right to take measures to protect himself, and to make any motion designed to show that the order adjudging him in contempt was erroneous."

If Genet had been adjudged to be in contempt for his escape (which, perhaps, might be done under proper notice and opportunity to him to show cause) he would be at liberty to take any steps to remove that order, but not to press aggressive proceedings in the case against the people. But he has not been adjudged to be in contempt, nor has any order of that nature been made upon him. The refusal of the court to proceed, does not depend on the rules affecting contempts, but on the grounds above stated. It may be contempt to escape custody and flee the jurisdiction of the court; but the contempt is one which can be readily removed by the return of the prisoner; and that is the only step open for him to take to effect its removal. The suggestion of counsel, that the bill should be settled and filed, to guard against dangers arising from the uncertainty of life, is an argument that he should more properly address to his client to hasten his return, lest he should lose the rights which his absence suspends. The court cannot protect him against risks of that character, occasioned by his own illegal conduct.

The motion for *mandamus* should be denied.

BRADY, J., concurred.

Motion denied.

HANNAH JANE HULL v. JAMES K. SPRATT AND JAMES
W. BOWNE, APPELLANTS, AND VERNON K. STEVENSON,
RESPONDENT.

Vendee—lien of, for purchase-money paid—lis pendens—who bound by judgment recovered after filing of.

The defendant, Stevenson, brought an action against the defendant, Spratt, for the specific performance of a contract for the sale of certain real estate to him, notice of pendency of action being duly filed on the 29th of April, 1871, and on the 10th of June, 1872, a judgment was entered in his favor therein, by which it was adjudged, that, as the defendant, Spratt, was unable to specifically perform the said contract, the amount recovered thereby, should be a lien on the surplus moneys arising from a sale of the premises under a prior mortgage lien, from the time of the filing of the *lis pendens*. On the 18th of May, 1871, the defendant, Bowne, recovered a judgment against Spratt, which was duly docketed. The premises having been sold under a mortgage which was prior to the rights of either of these parties, *held*, that the defendant, Stevenson, had a lien upon the surplus moneys arising upon the sale, which was prior to that of Bowne, and that the judgment recovered by Stevenson, was evidence of this priority against Bowne, because the latter acquired his lien, under the debtor and vendor, after the notice of *lis pendens* in the action was filed.

APPEAL from an order affirming the report of a referee, directing the distribution of the surplus moneys, arising on a sale of premises, under the foreclosure of a mortgage. On the 2d of September, 1870, the defendant, Spratt, agreed to sell certain premises in the city of New York to the defendant, Stevenson, but, at the time appointed for the delivery of the deeds, he was unable to perform the contract on his part. In April, 1871, Stevenson commenced an action to compel the specific performance of this contract, the *lis pendens* being filed on the twenty-ninth of April, and on the 10th of June, 1872, a judgment was entered in his favor, by which it was adjudged that he should recover of Spratt, the sum of \$1,350, and the said sum was declared a lien on the surplus moneys arising from the sale of the premises, contracted to be sold under a prior mortgage lien, from and after the date of the filing of the *lis pendens*. On the 18th of May, 1871, the defendant, Bowne, recovered a judgment against Spratt for \$4,452.58, which was duly docketed. The premises having

been sold on the foreclosure of a mortgage, prior to both of these judgments, it was referred to a referee, to report as to the proper distribution of the surplus moneys arising upon the sale. He reported that the lien of the defendant, Stevenson, was prior to that of the defendant, Bowne, and, his report being confirmed by the court at Special Term, the defendant, Bowne, appealed.

H. Brewster, for the appellant, Bowne.

W. H. Peckham, for the respondent.

DANIELS, J. :

The respondent's judgment, directed to be paid as a prior lien to the judgment recovered by the appellant out of the surplus moneys arising from the foreclosure sale, was recovered as a specific lien upon the fund. The action was brought to enforce the specific performance of a contract for the conveyance of the property, and a notice of *lis pendens* was properly filed in it, before the appellant recovered his judgment. And, as the property was sold under the foreclosure of a mortgage superior to the rights of either of these parties, the respondent recovered a judgment for the money he had paid upon his contract as a specific lien on the vendor's interest in the fund. This was equitable and just, because, by the contract, the vendor became, in effect, a trustee of the title for the vendee. The property was equitably his, so far as the purchase-price was paid, and, to that extent, a judgment recovered against the vendor, did not become a lien upon it.*

When the appellant recovered his judgment, it was subordinate to the action then pending in the respondent's favor. He had previously filed notice of the pendency of his action, which rendered it the duty of the appellant to take notice of the proceedings in it. Indeed, it operated as notice to the appellant, whose rights to proceed against the fund were all afterwards acquired. By the judgment in the respondent's favor, so much of the fund as was necessary for that purpose, was appropriated to its payment. And, so far as the appellant was concerned, whose judgment simply

* *Wilkes v. Harper*, 2 Barb. Chy., 389; *Matter of Howe*, 1 Paige, 125.

became chargeable on the interest of his debtor, it took effect from the time the notice of the pendency of the action was filed.

It was, therefore, rightly held, that the respondent's specific lien upon the fund, should be discharged before anything could be paid to the appellant, who, at most, had but a general lien. And the judgment was evidence against the appellant of this priority, because he acquired his lien under the debtor and vendor, after the notice of the pendency of the action was filed. That was sufficient to conclude him by means of the respondent's judgment afterwards recovered in the same action.*

But, by the judgment, the respondent was only entitled to be paid the amount recovered by him as a lien upon the fund. And that was the sum of \$1,114.72, with interest from April 22, 1872, while the report of the referee, and the order confirming it, awarded him that amount, with interest from April 22, 1871. The order and the report should be modified so as to direct the amount to be paid, with interest from April 22, 1872, and, as so modified, affirmed, without costs.

DAVIS, P. J., and BRADY, J., concurred.

Order modified, and, as modified, affirmed.



THE PEOPLE v. WILLIAM J. SHARKEY.

Writ of error — certiorari — motion to dismiss — fugitive from justice.

A writ of error allowed after judgment, and before the escape of a prisoner, will not be quashed on motion of the people, though it appear that after the allowance of such writ, the prisoner escaped and fled the jurisdiction of the court.

MOTION to quash and dismiss writs of error and certiorari, issued from this court to the Court of Sessions.

B. K. Phelps, district attorney, for people.

Wm. A. Beach, opposed.

* Code, § 133; *Harrington v. Slade*, 22 Barb., 163-166.

DAVIS, P. J. :

The affidavit in the case shows, that, after judgment, and prior to the escape from jail of Sharkey, a writ of error and stay of proceedings were duly allowed by one of the justices of this court, and, that subsequent to the escape, a writ of certiorari was allowed to bring up matters *dehors* the record.

In the case of the application of Henry W. Genet,* for a mandamus, this court have come to the conclusion that the convict, who thus escapes and remains a fugitive, cannot require, at the hands of the courts or judges, any proceeding in his favor, or insist upon any steps adverse to the prosecution, but that his rights to act adversely to the people, are waived and suspended by his own criminal conduct.

The effect of this act is to leave the case *in statu quo*, so far as action of the convict is concerned.

The court would not, therefore, take any action on his motion or behalf. But it does not follow that courts may, on motion of the people, deprive him of the benefit of proceedings already taken before his escape. We think, therefore, that the writ of error should not be quashed.

The certiorari might properly have been denied; but as it is auxiliary to the writ, and as the court below will not be compelled to make return to either writ, until Sharkey shall be again in custody, within the jurisdiction of the court, we think the better course is to deny the motion in both its aspects.

BRADY, J., concurred.

Motion denied.

* See ante, p. 292.

MEMORANDA

OF

CASES NOT REPORTED IN FULL.

JAMES BROWN, RESPONDENT, *v.* EDWIN POST, APPELLANT.

Agent—purchase of principal's property by—fraudulent representations—discovery of—active vigilance—not required.

Plaintiff was the owner of certain mining property, of which the defendant, as his agent, had the care and management. Being desirous of disposing of the same, he entered into an agreement with defendant, whereby he was to convey the Irondale and Denmark mines, and a note made by one Condit, to defendant for \$301,000. Plaintiff was induced to enter into this agreement by the representations of defendant, that the Irondale mine could be sold to one Popenhausen for \$100,000; it being distinctly understood between the parties that the defendant would realize the sum of \$25,000 for his services in making the sale and no greater sum. At the time this agreement was entered into, defendant had already contracted to sell the Irondale mine to Popenhausen for nearly \$200,000. Plaintiff, in ignorance of this fact, conveyed the Irondale mine to defendant in pursuance of the agreement, and he conveyed it to Popenhausen, receiving nearly \$200,000 for it. Subsequently plaintiff discovered the fraud and brought this action to have the sale of the Denmark mine canceled, and to recover the difference between the price for which the defendant sold the Irondale mine and the amount paid by him as the purchase-price of it, including the expenses attending the sale and completion of the title and a compensation to him of \$25,000. *Held*, that he was entitled to recover; that before the defendant could lawfully become the purchaser of the property which constituted the subject of his agency, his relations to it required that he should fully and fairly disclose to his principal all the facts which were known to him that could be supposed to affect the terms on which it might be proper to dispose of it.

In order to sustain such a transaction and secure the sanction of a court of equity for it, the agent must be able to show it to be fair and honest, and to have been preceded by the disclosure of what he had ascertained or discovered concerning its value and propriety, where the principal has not dispensed with the performance of that duty.*

* *Ringo v. Binns*, 10 Peters, 260; *Farman v. Brooks*, 9 Rich., 213, 231; *Story's Equity Jur.*, 9th ed., §§ 315, 316 a.

Before the deed for the Irondale mine was received by the purchaser, intimations were given to the plaintiff's counsel that the defendant had sold the property for more than the plaintiff supposed he was receiving, but, upon a partial investigation being made, the suspicion created by such intimations, was removed. A more decided investigation might have led to a discovery of the truth before the deed was delivered. *Held*, that the plaintiff was under no obligation to the person deceiving him to make such investigation.* A person deceived by the fraudulent misstatements of another, owes him no duty of active vigilance in the discovery of the fact that they are false; where, by means of that character, he deceives another to his prejudice, there is nothing in the law requiring him to be protected against the consequence of his wrong, because the person imposed upon, did not suspect him and adopt some means to discover the imposition.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

John E. Burrill, for the appellant.

Clarkson N. Potter and James P. Lowrey, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and WESTBROOK, J., concurred.

Judgment affirmed, with costs.

EDWIN HADLEY, APPELLANT, v. SAMUEL C. BOEHM,
IMPLEADED, ETC., RESPONDENT.

*Discharge in bankruptcy — supplemental answer — order allowing — not
appealable.*

This action was commenced in September, 1871, issue was joined in November, 1871, and an affidavit of merits served December 30, 1871. The cause was on the calendar until January Term, 1874, when an inquest was taken, and judgment entered on January sixteenth. In November, 1873, defendant instituted proceedings in bankruptcy, and, on April, 18, 1873, received a discharge from all his debts including the one for which this suit was brought. Defendant's attorneys, when advised by him of his proceedings to be discharged, understood him to instruct them that they should give the case no farther attention, and they, acting upon this, allowed the inquest to be taken.

* *Baker v. Spencer*, 47 N. Y., 562.

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The plaintiff had notice of such proceedings. The defendant having received his discharge, and fully relying on the same as ending the suit, paid no attention to it until he learned that judgment had been entered against him, when he applied to have the judgment set aside, and for leave to file a supplemental answer, setting up his discharge. *Held*, that upon these facts, the order granting the application was proper; and *held*, further, that the order being discretionary, was not appealable.*

APPEAL from an order made at Special Term, setting aside a default taken at circuit, and allowing the defendant, S. O. Boehm, to file a supplemental answer, setting up his discharge in bankruptcy, which was obtained since serving his original answer.

B. F. Watson, for the appellant.

Salter & Coving, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, with costs.

ALEXANDER H. SEAVER AND ANOTHER, APPELLANTS, v.
GEORGE MOORE, RESPONDENT.

Fraudulent stipulation — motion to set aside.

The plaintiffs applied for an order setting aside a stipulation, made in this action, vacating an order of arrest, alleging in their affidavits that their former attorney, who signed the stipulation, had no authority from either of them to make it, and that, for the purpose of obtaining thirty dollars, he willfully and corruptly stipulated away their rights herein; that there are entries in the register of defendant's attorney, showing that, on the 6th June, 1870, such attorney made an agreement with the plaintiffs' attorney to pay him thirty dollars for a stipulation to discharge the order of arrest, and that he did pay that sum on that date for said stipulation; and that plaintiffs had just been informed, by their present attorney, of the signing of the stipulation by their former attorney. The court held that the affidavit of defendant's attorney did not satisfactorily meet the

* *Medbury v. Swan*, 46 N. Y., 200; *Millard v. Van Brunt*, 17 Abb., 319; *Walt's Ann. Code*, 831.

charge and that the stipulation should be annulled, but without prejudice to the sheriff, who was released by the order made upon it from all responsibility.

APPEAL from an order denying a motion to set aside a stipulation made in the action vacating an order of arrest.

Charles J. Guiteau, for the appellants.

Horatio N. Walker, for the respondents.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order reversed with costs; stipulation and order entered upon it set aside without prejudice to the rights of the sheriff acquired by its entry.

ROBERT GOELET v. THOMAS McMANUS AND OTHERS.

Surplus moneys — recording act — unrecorded mortgages — bona fide purchaser.

On the 10th of April, 1871, W. Jeremiah, the owner of certain real estate, executed his bond, secured by a mortgage upon said premises, for \$3,000, to J. Jeremiah, who, on the 25th of July, 1871, delivered the same to one Morgan. On September 18, 1871, W. Jeremiah conveyed the premises to Mary Ann, wife of John Jeremiah, without consideration, the grantee having actual knowledge of the mortgage then held by Morgan, and the consideration he had paid for it. The deed to Mary Ann Jeremiah was recorded October 5, 1871. On October 28, 1871, John Jeremiah executed a written assignment of the bond and mortgage to Morgan, and, on January 2, 1872, the mortgage and assignment were recorded. On the 16th of January, 1873, Mary Ann Jeremiah executed a mortgage upon the premises to one Andrews, for \$3,000, who assigned it to one Herman on the twenty-second of the same month, the mortgage having been recorded on the twenty-first. Herman had no notice of the first mortgage, except such constructive notice as was given by the record. *Held*, that when Morgan put his mortgage on record, January 2, 1872, it was a complete and perfect lien, and that the lien acquired by Herman, under the mortgage to Andrews, was subsequent thereto.*

* The cases of *Van Rensselaer v. Clark*, 17 Wend., 25; *Ring v. Richardson* 3 Keyes, 450, and *Schutt v. Large*, 6 Barb., 378, followed.

FIRST DEPARTMENT, MAY TERM, 1874.

APPEAL from an order of the Special Term, confirming a report of a referee on distribution of surplus moneys.

Blumenstiel & Ascher, for the appellant.

T. D. Pelton, for the respondent.

Opinion by DAVIS, P. J.

DANIELS and BRADY, JJ., concurred.

Order affirmed, with costs.

MORRIS HIGGINS, PLAINTIFF IN ERROR, v. THE PEOPLE,
ETC., DEFENDANTS IN ERROR.

Indictment — rape — false testimony — effect of when wilfully so — virginity — immateriality of.

On the trial of an indictment for rape, the judge charged the jury that if they believed, from all the evidence, that the complainant was not a virgin, it did not lessen the crime in the slightest degree. *Held*, to be a correct charge.

In case of rape, if the party raped conceal the fact for any considerable time after an opportunity to explain, except from fear, this and like circumstances afford a strong, though not conclusive, presumption that her testimony is feigned.*

It is not true, as a rule of law, that if the complainant has been contradicted by competent and reliable witnesses in any one of the material facts sworn to by her, the jury should discredit her testimony *in every particular*.†

The rule, false in one thing false in all, only applies when the witness wilfully or designedly testifies falsely.

Writ of error to the Court of General Sessions of the Peace, held in and for the city and county of New York.

William F. Howe, for the plaintiff in error.

B. K. Phelps, district attorney, for The People.

Opinion by BRADY, J.

DANIELS and WESTBROOK, JJ., concurred.

Judgment affirmed.

* 1 Hale, 633-635; 1 Hawk. C., 41-59; 1 Arch. Cr. Pr. & Pl., 169, 7th ed.

† *Wilkins v. Earle*, 44 N. Y., 172.

THOMAS HOLLOWAY, RESPONDENT, v. BENJAMIN F. STEPHENS, APPELLANT.

Reversal of judgment—restitution of money collected under—stipulation—void as against public policy.

A judgment was entered in this action in favor of the defendant, from which the plaintiff appealed to the General Term, where it was reversed, and a new trial ordered.

Pending the appeal, the defendant proceeded to collect the judgment by execution and levy, and the appointment of a receiver of the plaintiff's property. Certain property of the plaintiff's was sold on execution under an agreement made between the defendant and plaintiff's agent, who was the defendant's receiver, that the money should not be restored in case the judgment was reversed, and that plaintiff's agent should be permitted to purchase and become the owner of the property thus sold. After the reversal of the judgment at General Term, an order was made directing the restitution to the plaintiff of the amount collected under the judgment. *Held*, that the order was correct; that the agreement between plaintiff's agent and defendant was void, as against public policy, as it in effect provided for transferring the property of the principal to the agent, and that it was not binding upon the plaintiff.

APPEAL from an order, directing restitution to the plaintiff, of property collected under a judgment which had been reversed.

Titus B. Eldridge, for the appellant.

John Clinton Gray, for the respondent.

. Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed, with costs.

ALBERT J. SMITH, RESPONDENT, v. JOHN BODINE AND
OTHERS, APPELLANTS.*Motion to amend answer — when denied — laches — discretion.*

When a case has been long pending, and is on the second trial before a referee, and when the evidence given on the preceding trial, subjects the affidavit, made in support of the application for leave to amend the answer, to grave suspicions as to the correctness of its statements, the court will consider such circumstances on such an application.

Whether an amendment to a pleading should be allowed or not, has been confided, by the provisions of the Code, very much to the discretion of the court hearing the motion. And, ordinarily the exercise of that discretion is not afterwards the subject of review by the General Term, upon appeal.

APPEAL from an order denying leave to amend an answer, by adding an allegation materially changing the effect of an admission, made as to the amount of compensation due to the plaintiff for his services.

Cyrus Lawton, for the appellants.

Henry Nicoll, for the respondent.

Opinion by DANIELS, J.

Order affirmed.

THOMAS M. TYNG, APPELLANT, v. THE UNITED STATES
SUBMARINE AND TORPEDO BOAT COMPANY,
RESPONDENT.*Motion for reargument — denied.*

This case was decided at the March term, the opinion being delivered by DANIELS J., and reported *ante*, at page 161. At this term, a motion for a reargument was made substantially for the reason that the patents procured by the plaintiff were delivered to the defendant, and that this action for the money paid by the plaintiff in procuring them may be sustained, even though they were not procured under its employment, or the money paid at its request. The referee found that the patents never were delivered to the company. And the court, upon a review of the evidence, held, that it was not sufficient to authorize them to reverse this finding. For this reason, and because it appeared from the plaintiff's own testimony that the

defendant was only to pay as soon as any money was received in the treasury, and that no money ever was received, the motion for a reargument was denied.

H. E. Davies, Jr., for the motion.

———, opposed.

Opinion by DANIELS, J.

DAVIS, P. J., concurred.

Motion denied, with costs.

GEORGE SLOANE, RESPONDENT, v. WILLIAM ELMER,
APPELLANT.

Damages—servant—liability of principal for.

This action was brought to recover damages for injuries to plaintiff's wife and son, and to his carriage, by a collision alleged to have occurred through the negligence of defendant's servant. At the trial, the defendant introduced evidence to show that he was not the owner of the horses and carriage which had caused the injury, nor the master of its driver. The judge, having left to the jury the question of the ownership of the horses and carriage, was requested to charge "that if they find the coachman was not the servant of the defendant, but was in the employ of Mrs. Hunt (one of the occupants and the alleged owner of the carriage), they cannot find for the plaintiff," and declined so to charge. *He'd*, that his refusal so to do was error. The liability of the defendant depended entirely upon the fact that the coachman was his servant, and the question of the ownership of the carriage and horses was only material as it tended to prove or disprove this fact.

APPEAL from a judgment, entered in favor of the plaintiff, on the verdict of a jury, and from an order denying a motion to set aside the verdict.

Titus B. Eldridge, for the appellant.

A. R. Dyett and R. W. Townsend, for the respondent.

Opinion by DAVIS, P. J.

DANIELS and LAWRENCE, JJ., concurred.

Judgment reversed and new trial ordered.

PATRICK SLATTERY, PLAINTIFF IN ERROR, v. THE PEOPLE,
ETC., DEFENDANTS IN ERROR.

Charge of the court — made at prisoner's request — cannot afterwards be objected to by him.

Writ of error to review the conviction of the plaintiff in error, at the Court of General Sessions, upon an indictment for an assault with intent to kill. Before the case was submitted to the jury, the prisoner's counsel requested the court to charge that he could not be convicted, under the indictment, for an assault with a sharp, dangerous weapon, with intent to do bodily harm, and the court so charged. *Held*, that the charge having been made at his request, he could not afterwards object to it, although it was clearly erroneous; nor could he have been prejudiced by this error, as the jury have, by their verdict, negatived the idea that the crime committed by him was anything less than that charged in the indictment.

Writ of error to review the conviction of the plaintiff in error, for assault with intent to kill, at the February Term of the Court of General Sessions of the city of New York.

William F. Kintzing, for the plaintiff in error.

Benj. K. Phelps, district attorney, for the defendants in error.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Conviction affirmed.

ANDREW SOHER, RESPONDENT, v. JAMES C. FARGO,
TRUSTEE ETC., APPELLANT.

Supplemental complaint — leave of court necessary to serve.

The plaintiff in this action, four months after the service of the answer, served an amended summons and a supplemental complaint, without obtaining any leave of court, either *ex parte* or on motion. *Held*, that this should be set aside; that the right to serve a supplemental complaint is not an absolute one, but rests in the sound discretion of the court, and it cannot be served without leave of the court first obtained.

Beach v. Reynolds (53 N. Y., 1) followed.

APPEAL from an order made at the Special Term, denying a motion to vacate and set aside, as irregular and unauthorized, an amended summons and a supplemental complaint.

Hamilton Cole, for the appellant.

E. L. Andrews, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order reversed, with costs.

WILLIAM O'TOOLE, RESPONDENT, v. P. GARVIN AND
OTHERS, APPELLANTS.

Answer — amendments to — when allowed — discretion.

APPEAL from an order denying a motion for leave to amend the answer. This case was before the last General Term, held in March,* and it was then decided that the defense interposed by the defendant, that the plaintiff had carried on business under a firm title in violation of 3 Revised Statutes (5 ed., 978, §§ 42, 43), not having been set up in the answer, could not be proved upon the trial. Subsequently a motion was made for leave to amend the answer, by setting up this defense, which was denied. The General Term affirmed this order, holding that the application was addressed to the discretion of the court, and that the amendment was not meritorious, the defense which the defendant sought to interpose being a purely technical one.

E. D. McCarthy, for the appellant.

D. M. Porter, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J. and DANIELS, J., concurred.

Order affirmed, with costs.

* See *ante*, p. 92.

LOUISE H. SERVOSS AND ANOTHER, APPELLANTS, v. WILMER
S. WOOD AND OTHERS, EXECUTORS OF THE LAST WILL AND
TESTAMENT OF SILAS WOOD, DECEASED, RESPONDENTS.

Supplemental answer — statute of limitation — laches.

Action commenced by plaintiff's testatrix, to have a conveyance of land made to defendant's testator, declared a mortgage. Pending a reference, all of the original plaintiffs and two of the defendants died. An amended supplemental complaint was served April 15, 1872, to which an answer was served May 7, 1872. This answer set up the statute of limitations. The original referee having died, the action was, by consent, again referred, and the trial commenced before the new referee. A motion was then made by plaintiffs, to have that portion of the amended answer, which set up the statute of limitations, stricken out. *Held*, that the motion was properly denied, on the ground of laches, a year and nine months having elapsed after service of the answer before making the motion.

APPEAL from an order denying a motion to strike out so much of the several answers of the defendants herein, as set up the statute of limitations.

F. C. Cantine, for the appellant.

Flamen B. Candler, for the respondent.

Opinion per *Curiam*.

Present, DAVIS, P. J., and BRADY and DANIELS, JJ.

Order affirmed, with costs.

JOHN BRENNAN, APPELLANT, v. THE MAYOR OF THE
CITY OF NEW YORK, RESPONDENT.*Principle of stare decisis — importance of — when departed from.*

In this action, brought by the plaintiff to recover for services rendered as an officer in the Court of Common Pleas, his appointment as such having been made under and by virtue of section 9, of chapter 383, of the Laws of 1870, the complaint was dismissed at the trial. *Held*, that as, when this case was before the General Term on a former appeal, the act, under which the plaintiff was appointed, was declared unconstitutional, and from that decision no appeal was taken, the order should be affirmed, on the principle of *stare decisis*.

That principle is one of great importance in the administration of justice, and should not be departed from, except in extreme cases founded upon some change in the law of the land, either by legislation or by courts of last resort, or when the court is satisfied that an erroneous conclusion has been declared.

APPEAL from a judgment entered in favor of the defendant, upon an order dismissing the plaintiff's complaint, made at the trial of the case at the circuit.

Franklin Bartlett, for the appellant.

E. Delafield Smith, corporation counsel, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed, with costs.

SULLIVAN FOREHAND, APPELLANT, v. WILLIAM P. COLLINS, IMPEADED WITH A. J. MELLEN AND ANOTHER, RESPONDENTS.

Venus—Code, §§ 125, 126.

In this case, an application was made to change the venue from the city and county of New York, to the county of Suffolk. The defendant, Mellen, resided in the city of New York, and the defendant, Collins, who alone appeared and served an answer, resided in Suffolk county, the plaintiff and the remaining defendant being non-residents. *Held*, that the venue was properly laid; that the plaintiff had, under section 125 of the Code, the option of selecting the place of trial, as between the two defendants, and that the fact that Collins was the only defendant who appeared in the action, did not affect the question. The statute does not distinguish between those who appear and those who do not.

APPEAL from an order made at Special Term, changing the venue in the action, from the city and county of New York, to the county of Suffolk.

John Sherwood, for the appellant.

— — — — —, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order reversed, with costs.

EDMUND W. HOLMES, RESPONDENT, v. SAMUEL M. PET-
TENGILL AND JAMES H. BATES, APPELLANTS.

Evidence of custom not admissible to vary terms of special contract.

In an action, brought by the plaintiff to recover for service rendered in introducing customers to the defendants' advertising agency, at the trial of which, both plaintiff and defendants swore to a special contract, under which the plaintiff did business for the defendants, although they did not agree as to its character, the following question was put by defendant's counsel: "Are you acquainted with the custom of defendants' house in respect to their dealings with canvassers?" and excluded by the referee. *Held*, that its exclusion was proper: that evidence was not admissible to show that the house had a custom in respect to dealings

with canvassers which was supposed to be more consistent with the testimony of the defendants, as to the contract, than with that of the plaintiff.

APPEAL from a judgment, entered in favor of the plaintiff, upon the report of a referee.

Amos G. Hull, for the appellants.

Walter S. Cowles, for the respondent.

Opinion by DAVIS, P. J.

DANIELS and WESTBROOK, JJ., concurred.

Judgment affirmed.

THOMAS HOPE, RESPONDENT, v. CHARLES E. LAWRENCE
AND ANOTHER, APPELLANTS.

Conversion — pledgee of stock.

A sale by a pledgee, without authority, or for non-compliance with a demand which the pledgee has no right to make, or after a tender of the debt for which the pledge is held, is a conversion. Plaintiff sued the defendants for the conversion of certain shares of bank stock, held by defendants as collateral security to a debt due them on account of gold purchased for plaintiff. The jury found that plaintiff had given an absolute order to the defendants to sell at 217, at which price they might have sold, but, claiming the order to be discretionary, they failed to do so, and the gold was subsequently sold at 207½. Plaintiff tendered a sum sufficient to pay the balance of the account, if the gold had been sold at 217. *Held*, that a sale, after such tender, was a conversion, and that plaintiff was entitled to recover the value of the stock sold, after deducting the actual indebtedness, for which it properly stood in pledge.

APPEAL from a judgment in favor of plaintiff, entered upon a verdict of a jury.

S. C. Conable, for the appellants.

A. R. Dyett, for the respondent.

Opinion by DAVIS, P. J.

DANIELS and WESTBROOK, JJ., concurred.

Judgment affirmed.

CHARLES E. HADDEN, RESPONDENT, v. FRANCIS
HOUGHTALING, APPELLANT.*Evidence — expert — opinion of.*

This action was brought to recover for materials and work, furnished and performed by the plaintiff in repairing defendant's house. At the trial, defendant attempted to prove the condition of the premises, immediately previous to the time the work was performed. *Held*, that the evidence was properly excluded, as irrelevant and immaterial. A witness, called by defendant, was asked by him, how many days it would take, in his opinion, to perform the work set out in the bill of particulars. *Held*, that the evidence was properly excluded, because it did not appear that the witness had examined the work done for the purpose of estimating the number of days' work required to perform it.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

Whitehead H. Van Wyck, for the appellant.

S. L. Macomber, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed with costs.

*Five Cases.*EDWARD S. INNES, RESPONDENT, v. MARGARET PUR-
CELL, IMPLEADED, ETC., APPELLANT.

Appeal — pleadings — making more definite — order made by default — not reviewable.

The Special Term ordered that the defendant's answers be made more definite. After the expiration of the time to amend, the plaintiff moved, on notice, to strike out the answers, and for judgment. The defendant did not appear, and the motion was granted by default, and judgments entered for plaintiff. From these judgments defendant appealed. *Held*, that the order striking out the answers, having been granted by default, is not reviewable on appeal, and

that, under such circumstances, the court would not regard the answers as reinstated, for the purpose of reviewing the orders to make the answers more specific.

MOTION to dismiss appeal.

Mr. Venville, for the motion.

Mr. Arnoux, for the appellant.

Opinion by DAVIS, P. J.

DONOHUE, J., concurred.

Appeal dismissed, with costs.

WILLIAM PALEN, RECEIVER OF HENRY BANGE,
APPELLANT, v. EZRA L. BUSHNELL, RESPONDENT.

*Debtor—assignment of property to creditor for benefit of — recovery in such cases —
amount of — by receiver.*

When the evidence shows that the debtor transferred property to his creditor not only to pay the debt due him, but for the purpose of preventing his other creditors from appropriating any part of it to the payment of debts due themselves, *held*, that the creditor should be required to pay over all the property received in excess of his claim.

APPEAL from judgment, entered on the report of a referee in the Supreme Court, in favor of defendant.

F. R. Sherman, for the appellant.

John H. Strahan, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and DONOHUE, J., concurred.

Judgment reversed; new trial ordered.

EDWARD K. WINSHIP, APPELLANT, v. CAROLINE F.
WINSHIP, RESPONDENT.*Discretion.*

APPEAL from an order vacating an order entered, discontinuing the action.

The General Term held that the application to vacate the order was addressed to the favor and discretion of the court, and that as there was sufficient in the papers to warrant the conclusion, that the defendant had consented to the discontinuance, under a misapprehension on her part, the order was properly granted.

Hodges & Meeker, for the appellant.

H. C. Denison, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed, with costs.

ANTHONY POLLOK, RESPONDENT, v. JOHN S. SHULTZE,
AS RECEIVER OF THE NOVELTY IRON WORKS.*Liability of corporation for contracts of its directors.*

The president and vice-president of the Novelty Iron Works, having full authority to employ such persons, as, in their judgment, were necessary in and about the business of the company, and the company having resolved to enter upon the business of manufacturing water meters, of the kind invented by one Van Duzen, *held*, that it was within the scope of their authority to secure a patent in the name of Van Duzen, of his invention, and, for this purpose, to employ plaintiff to counsel and advise the company in relation to the said meter, and to obtain a patent therefor, and that the corporation were liable for his services, rendered in pursuance of such employment.

APPEAL from a judgment, entered in favor of plaintiff, on the report of a referee.

John N. Whiting, for the appellants.

B. F. Lee, for the respondents.

Opinion by DAVIS, P. J.

DANIELS and WESTBROOK, JJ., concurred.

Judgment affirmed.

IN THE MATTER OF _____ AN ATTORNEY AND
COUNSELOR-AT-LAW.

Attorney—professional misconduct—disqualified from practicing.

RESPONDENT appeared in this matter, in answer to an order to show cause why his name should not be stricken from the rolls, and he be disqualified from practicing his profession, or otherwise punished for professional misconduct. The court, after an examination of the evidence, concluded, in view of the respondent's positive denials and explanations, that it was not sufficient to justify the respondent's degradation and punishment; that the proceeding was penal, and should be sustained by evidence free from serious doubt.

Opinion by DANIELS, J.

DAVIS, P. J., and DONOHUE, J., concurred.

Motion denied.

MARIAN G. CATLIN, RESPONDENT, *v.* WILLIAM H. CATLIN, APPELLANT.

Divorce—motion to reopen case—denied.

APPEAL from an order, denying a motion to reopen the case before the referee, and permit the defendant to answer. The action was brought to obtain a divorce, on the ground of adultery. The court affirmed the order, on the ground that the affidavit of defendant was entirely insufficient, and was not even accompanied by an affidavit of merits.

M. P. Stafford, for the appellant.

J. T. Davies, for the respondent.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Order affirmed, with costs.

JANE PATTERSON, EXECUTRIX, ETC., RESPONDENT, v. WILLIAM PATTERSON, APPELLANT.

Set-off — against executors — § 23, title 2, chapter 6, part 3, Revised Statutes.

In an action brought by an executor upon a cause of action arising after the decease of the testator, the defendant cannot set off a demand against the testator, even although such demand existed at the time of the testator's death.

In order to authorize such set-off, the demand must not only be sued by the executor, but it must be upon a cause of action which had accrued at the time of the decease of the testator or intestate.*

APPEAL from a judgment in favor of plaintiff.

John Townshend, for the appellant.

Sterne Chittenden, for the respondent.

Opinions by DANIELS and LAWRENCE, JJ.

DAVIS, P. J., concurred.

Judgment affirmed.

* *Merritt v. Seaman*, 6 Barb., 330; *Id.*, 6 N. Y., 168, followed.

PHILO T. RUGGLES, AS RECEIVER, ETC., APPELLANT, v.
ORLOW W. CHAPMAN, AS SUPERINTENDENT OF THE
INSURANCE DEPARTMENT, IMPLEADED, DEFENDANT AND
RESPONDENT.

*Insurance Department—securities deposited with—power of Superintendent—§ 6,
chapter 463, 1853.*

By section 6, of chapter 463, of Laws of 1853, all life insurance companies are required to deposit with the Comptroller of the State of New York, the sum of \$100,000 in certain stocks and securities in the said act specified, to be held as security for policy-holders in the company, the seventeenth section making special provision for the application of such securities by proceedings to be instituted in the Supreme Court by the Comptroller, through the Attorney-General. By chapter 366, of the Laws of 1859, all the powers and duties created and given to the Comptroller by the act of 1853, were transferred from that officer to the Superintendent of the Insurance Department. *Held*, that the deposited securities are a special fund for the security of policy-holders, primarily, and that their rights may be protected by the Superintendent, in the mode pointed out by the act of 1853, and that that officer is at liberty to hold the securities and enforce or dispose of them under proceedings authorized by the court, and is not bound to hand them over to a receiver appointed by a local tribunal, under the Revised Statutes, for the benefit of general creditors.

CASE submitted upon an agreed state of facts, in pursuance of section 372, of the Code.

John L. Hill, for the plaintiff and appellant.

Fred. H. Betts, for the defendant and respondent.

Opinion by DAVIS, P. J.

DANIELS and BRADY, JJ., concurred.

Judgment ordered for the defendant.

Cases

DETERMINED IN THE

THIRD DEPARTMENT

AT

GENERAL TERM,

May, 1874.

JOHN WARDROP, RESPONDENT v. JESSIE DUNLOP, AS
EXECUTRIX, AND ANOTHER, APPELLANTS.

*Promissory note — possession of, by agent — payments to agent upon — when binding
upon his principal — Ratification.*

The mere fact that a person, claiming to be the agent of the payee of a promissory note, has the same in his possession, unindorsed, does not confer upon him an apparent authority to receive payments thereon. *Doubleday v. Kress*, 50 N. Y., 410, followed. The cases on this subject collated and distinguished.

An agent who had in his possession a promissory note, received a payment thereon without authority from his principal, who, when informed of the payment, by the agent, remained silent for nearly three years, allowing the money to remain in the agent's hands. At the end of this time, he wrote to him about the note, and, in computing the amount due thereon, allowed the payment so made. During this time other payments had, unknown to the principal, been received by the agent. *Held*, that, by his letter to the agent, he was precluded from denying his authority to receive the first payment, and that by ratifying this act of the agent, and by failing, after knowledge of the first payment, to notify the maker of the note that the agent had no authority to receive payments, he conferred upon him an apparent authority to receive the subsequent payments.

APPEAL from a judgment entered in favor of the plaintiff, upon the report of a referee, upon a claim against the testator's estate, referred under the statute.

On the 19th June, 1854, Archibald A. Dunlop gave his promissory note to John Wardrop, payable to his order, for \$3,600, with interest at six per cent; and John Wardrop, during the same year, when leaving this country for Scotland, where he had previously and has since resided, left the note with his cousin, Robert Wardrop, of Newburgh. Robert Wardrop gave a receipt for the note, in which he said it was left with him for safe-keeping, but Dunlop had no knowledge or notice of such receipt.

In 1856, a payment was made on the note, by Dunlop, to Robert Wardrop, of \$342, which was sent by Robert Wardrop to the plaintiff; and, in 1858, another payment of \$432, was made in like manner through Robert Wardrop.

In 1859, Robert Wardrop died, and his son, William, as his administrator, took possession of the note, which he found among his father's papers. In January, 1860, Mr. Dunlop remitted to the plaintiff, \$432 interest on the note.

On the 18th of September, 1860, the plaintiff wrote to William Wardrop, and, among other things, said: "I write to Mr. Dunlop by the same mail, to make up a statement of the interest due, up to date, on the due-bill that was in your father's possession, and get it remitted, and informed him that I authorized you to give a receipt for the amount. The due-bill itself, will you be kind enough to retain in your possession until you hear from me?"

By Dunlop's letters to plaintiff, of December 3, 1860, and May 2, 1867, further time for payment was asked, on account of the condition of the country and the high rate of exchange, and payment was delayed. On the 26th of December, 1866, the plaintiff wrote to the testator as follows: "The war in America having deranged monetary matters so much, I did not think of writing about it; but, if convenient, you might send the interest due, which is, I think, since January, 1860; but if you think it would be more advantageous for me and equally convenient for yourself, you might remit me a due-bill for the amount." He also wrote, on the same day, a letter to William Wardrop, in which he says: "I have wrote to Mr. Dunlop by the same mail, and expect an answer from him soon. If you will keep the due-note until I hear from him and write you, good and well; but if you are determined to have it out of your possession, you can mail it."

On the 2d of May, 1867, Dunlop wrote to the plaintiff a letter, in which, after acknowledging the receipt of plaintiff's letter of December 26, 1866, he says: "The exchange between the two countries just now is so great, it would be much against me to remit the amount of the note or interest—gold, to-day, being about \$1.40—but I will send a due-bill for the interest as soon as I ascertain the amount."

In February or March, 1869, William Wardrop came to Dunlop's house, at West Troy, and applied to him to pay the interest on the note, which he then had and showed to Dunlop, together with the letter of September 18th, 1860. Dunlop paid no money then, but, on the 15th of May, 1869, paid to William Wardrop the sum of \$1,432, which was indorsed upon the note as \$1,000 on principal, and two years' interest to January 19th, 1862, \$432.

Within a few days after receiving the foregoing sums, William Wardrop wrote to the plaintiff, stating the amount received by him upon the note. After the payment of May, 1869, William collected and received of Dunlop and of his executor—Dunlop having died in the meantime—different sums, amounting in all to \$2,924, which were indorsed upon the note when paid. The plaintiff did not answer William Wardrop's letter, advising him of the payment of \$1,432; but, in March, 1872, in answer to a letter of William, informing him of Dunlop's death, among other things, wrote as follows: "I shall see about getting the necessary documents prepared and sent out to enable you to collect the amount which I see was, after the \$1,000, and two years' interest paid to you was at January 19th, 1869, \$4,112, and interest due from that date."

The plaintiff had no notice of any payments being made after May, 1869, and in August, 1872, brought this action. The referee found in favor of the plaintiff for the whole amount claimed, \$6,553.64. The report was confirmed at Special Term, judgment entered, and the defendant appealed.

Amasa J. Parker, for the appellant. The possession of the note conferred upon Wardrop, an authority to receive payments thereon. (*Bridenbecker v. Lowell*, 32 Barb., 9; Story on Agency, §§ 93, 94, 228, 81; *Hutchings v. Munger*, 41 N. Y., 158; *Williams v. Walker*,

2 Sandf. Ch., 325; Reaff., 34 Barb., 613; Paley on Agency, by Lloyd, § 274.)

R. W. Peckham and *Edward Wade*, for the respondent. No apparent authority was conferred upon Wardrop to receive payments. (*Doubleday v. Kress*, 50 N. Y., 410.) The plaintiff never ratified his acts. (Dunlop's Paley's Agency, 345, note *h*, 100; *id.*, 387; note 13, Index, 454; *Amory v. Hamilton*, 17 Mass., 103.)

MILLER, P. J. The question upon this appeal, is, whether William Wardrop had authority to receive the payments made upon the note of Archibald A. Dunlop, deceased, which the plaintiff left with Robert Wardrop. It appears from the receipt given by Robert Wardrop to the plaintiff, that it was left for safe-keeping with William's father, in 1859, and passed into William's possession without the knowledge or authority of the plaintiff. The possession thus acquired, of itself, gave William no right to receive money on the note, and if any authority to do so existed and can be upheld, it must arise by virtue of power otherwise conferred. The defendants claimed that William was authorized by the letter sent to him from the plaintiff, of September 18th, 1860, in which he states that he had written to Dunlop to make up a statement of the interest on the note, and get it remitted, and informed Dunlop that he had authorized William to give a receipt for the amount, and requested him to retain the due-bill until he heard from the plaintiff. This letter conferred no authority to receive the money, but merely authorized William to give a receipt for the same, upon its being remitted by Dunlop. The letter of the plaintiff to Dunlop, on the 26th of December, 1866, requesting Dunlop to send the interest or a due-bill for the amount, and the answer of Dunlop, of May 2, 1867, in which he promised to send a due-bill for the interest, also showed that neither of them had understood that William Wardrop had authority to receive payments on the note; nor does the letter of the plaintiff to William, of December 26, 1866, confer any authority upon the latter to receive the money. In fact, there is no evidence showing such authority, up to the time when the first payments were made, or afterward.

It is said that there was an apparent authority to receive the payments, which is as obligatory as if there was actual authority. This position is based upon the assumption that William had possession of the note, and therefore, and from that fact, was authorized to receive payments upon it. Some of the cases to which we have been referred, appear to look in that direction; but the recent case of *Doubleday v. Kress* * holds to the contrary. In the case cited, an action was brought by the plaintiff to recover the amount of a promissory note made by the defendant, and payable to the order of the plaintiff. The plaintiff's son-in-law, one Murray, upon the representation that the defendant wished to pay the interest and renew the note, obtained the same of her, and, by means of a forged order attached, procured the money on the same. It was held that the mere possession of the note by the assumed agent, Murray, unindorsed, without any other sustaining facts, was not sufficient to authorize payment to him. The case cited, differs somewhat, and is far stronger as to the possession than the one at bar; for, while in the former, the note came lawfully into the hands of Murray, with authority to receive the interest and to take a new note, here, William Wardrop had no authority whatever from the plaintiff, and received the note without the approval of the plaintiff, and only because he found it among his father's papers.

In the case of *Bridenbecker v. Lowell* † which is relied upon by the defendant's counsel, there was evidence of express authority to do certain acts, and the remarks of ALLEN, J., at page 17, as to the presumption arising from the authority conferred, to assume the apparent right of disposing of property, and the effect of being put in possession of notes with apparent authority in respect to them (which was not the case here, as William Wardrop took possession without the plaintiff's knowledge or consent), while entirely appropriate to the case then under consideration, are not, I think, applicable here, or in conflict with *Doubleday v. Kress*. So also, the observation of the learned judge, in *Hutchings v. Munger*, ‡ as to the effect of having possession of notes for the purpose of receiving the money due thereon, must be considered in connection with the facts there presented, and do not, I

* 50 N. Y., 410.

† 32 Barb., 9.

‡ 41 N. Y., 158.

think, apply to a case where there is no evidence of any authority whatever. The cases of *Williams v. Walker* * and *Hatfield v. Reynolds* † sustain the principle; that, where one employs an attorney to make a loan of money, and to take a bond and mortgage from the borrower, and, after the loan is made, intrusts the attorney with the possession of the bond and mortgage, and permits him to receive and indorse payment from time to time, until these payments extinguish the principal, the attorney will, in fact and in law, be held to be authorized to receive the latter as well as the former payments, and, if he omits to pay it over, the loss must fall upon the mortgagee.

This is not exactly like the case at bar, because there was a direct authority to receive the payments, and the attorney was acting within the scope of his authority. In view of the cases referred to, it is difficult to see how any actual or apparent authority from the plaintiff, can be inferred from the fact of the note's being in the possession of William Wardrop, under the circumstances, and the plaintiff was not bound by his acts, unless, by some act, he ratified or acquiesced in the payments which were made, and thus conferred authority.

It appears that, after the payment of \$1,432, in May, 1869, with full knowledge of that fact and notice that it had been received, the plaintiff allowed William Wardrop to use the money for nearly three years, without any objection whatever on his part, and thus acquiesced in what had been done by him. He was informed that this money was received, soon after it was paid, and made no reply until March, 1872, when he wrote to William, that, after deducting the \$1,000, and two years' interest paid to him, \$4,112 and interest were due to him. There was an acknowledgment by the plaintiff that the amount of \$1,432 had been properly paid; that he was willing to allow it as a payment, and only claimed what remained. This, I think, precludes him from insisting that a larger sum was due than he named, or that the payment made was not authorized. It was far more than silence, and a direct admission that he claimed no more, which he cannot now retract or recede from. He is clearly bound by this declaration; if not as a ratification of the act of his agent, as an acquiescence in what had

* 2 Sanf. Ch. R., 825.

† 84 Barb., 613.

been done by a person who had assumed to act on his behalf, when the acts of the agent were brought to his knowledge, which is held to be equivalent to express authority.* The plaintiff, having thus sanctioned the payment of \$1,432, and thereby conferred authority for that, I am inclined to think that authority must be inferred as to the subsequent payments. It can scarcely be maintained that he could thus sanction and authorize one payment, without conferring an implied authority to receive others. If Dunlop or his representatives had been notified that the plaintiff had thus sanctioned one payment, there could be no question as to the power of the agent to receive others. The plaintiff, however, was informed of it. He did not repudiate it, or notify Dunlop that, in fact, the money had been paid without authority: By his silence, Dunlop or his representatives, who no doubt acted in good faith, were strengthened in their belief that the money was paid to a duly authorized agent.

Had the plaintiff never signified his approval of the payment referred to, his silence might, perhaps, be excused; but, taking the fact and the acquiescence together, and as the case stands, it must be considered that the plaintiff acquiesced in all the payments which were made.

As the referee was wrong in not deducting the payments made to William Wardrop, the judgment must be reversed, and a new trial granted, unless the plaintiff stipulate to deduct said payments and interest; in which case the judgment is affirmed, without costs of appeal to either party.

Present—MILLER, P. J., BOARDMAN and BOOKES, JJ.

Ordered accordingly.

* 2 Kent, 613.

No. 1.

SAMUEL BONNELL, JR., RESPONDENT, v. GEORGE M. WHEELER, CHESTER GRISWOLD AND JACOB W. HOYSRADT, IMPEADED WITH OTHERS, APPELLANTS.

No. 2.

ELI W. BLAKE, RESPONDENT, v. SAME DEFENDANTS, IMPEADED, ETC., APPELLANTS.

No. 3.

SAMUEL BONNELL, JR., RESPONDENT, v. CHESTER GRISWOLD, JOHN W. GRISWOLD AND ELIZABETH H. GRISWOLD, EXECUTORS, ETC., OF JOHN A. GRISWOLD, DECEASED, APPELLANTS.

No. 4.

ELI W. BLAKE, RESPONDENT, v. SAME DEFENDANTS, APPELLANTS.

Demurrer—misjoinder of causes of action—Trustees of manufacturing corporation—failure to file report—false report—assignment of cause of action against—Sections 12, 15, chapter 40, 1848.

In a suit brought by a creditor of a mining corporation, created under the general act, chapter 40, Laws of 1848, against the trustees thereof, *held*, that causes of action, arising under section 12, for failure to file a report, and under section 15, for filing a false report, are properly united; each of them is for a liability somewhat in the nature of a statute penalty, and, virtually, is an action on contract for the recovery of money, and both of them arose out of the same transaction.

The first cause of action set out in the complaint, was for a failure to file a report, as required by section 12; the second, for filing a false report in violation of section 15, alleged that the defendants made and filed "a certificate or report, a copy of which is hereunto annexed, marked B," and that the defendants signed the same, knowing it to be false; the copy of the certificate annexed to the complaint, was not signed by all the defendants. *Held*, that a demurrer, on the ground that the causes of action, united in the complaint, did not affect all the parties to the action, was well taken; that the allegation that the certificate was signed by all the defendants, must be considered as restricted and confined to what appears upon the face of the certificate, a copy of which was annexed to the complaint.

The cause of action against the trustees of the corporation, given by the statute to the creditors thereof for a violation of its provisions, is assignable, and may be enforced by the assignee of the debtor.

The third cause of action was for an alleged conspiracy on the part of the defendants to form the corporation, and that by fraud and misrepresentations, the plaintiffs were induced to become creditors of the corporation. *Held*, that it was properly joined with the others, as they all related to the same general transaction.

APPEALS from orders made by Mr. Justice BOOKES, overruling the defendants' demurrers, in each of the above-entitled actions, to the amended complaints therein. The plaintiffs therein respectively claim to be creditors of a company, or corporation, formed under an act of the legislature of the State of New York, entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17th, 1848, and the acts amending the same, and known as the Iron Mountains Company of Lake Champlain. The claim of the plaintiff, Samuel Bonnell, Jr., is alleged to amount to \$5,511.66, and that of the plaintiff, Eli W. Blake, is alleged to amount to \$1,247.40.

Suits Nos. 1 and 2, are prosecuted to *recover* from the defendants, the amount of the said plaintiffs' alleged claims, respectively, on the alleged ground that the said defendants, as the surviving trustees of said company, have become liable to pay the same.

And suits Nos. 3 and 4, are prosecuted to recover the same identical claims from the defendants therein named, as the representatives of John A. Griswold, deceased, who, in his lifetime, was also a trustee of said company, upon a portion of the grounds set forth in the two first actions.

The complaints are substantially alike, except in the averments descriptive of the plaintiffs' claims. The plaintiff, Bonnell, was not an original creditor of the Iron Mountains Company, but acquired his claim, if at all, by transfer or assignment from a corporation, styled the "Birmingham Iron Foundry," which corporation, it is alleged, performed work and labor, and furnished materials, whereby it became a creditor of said first-mentioned company, subsequently transferring its claim to the plaintiff, Bonnell.

In the first and second actions, the first counts, respectively, set forth the organization, in the month of August, 1869, of the said Iron Mountains Company, under the provisions of the act afore-

said, and that the defendants and said John A. Griswold (since deceased) were duly appointed, and acted, as the trustees of said company for the first year; that during that period, they omitted to make, publish or file a report, within twenty days from the first day of January, 1870, pursuant to the provisions of the twelfth section of the aforesaid act; by means of which alleged omission, it is claimed that the defendants became liable to pay the plaintiffs' claims, which are also, respectively, stated in said counts.

The second counts, after referring to the allegations in the first counts as to the incorporation of said company, respectively, set forth a copy of the charter, or certificate of incorporation thereof, referred to as annexed, and state that the said defendants and the said John A. Griswold, while acting as such trustees as aforesaid, did, on the 13th day of January, 1870, make and file in the office of the clerk of the county of Essex, a certificate or report, a copy of which is made a part of the complaints (referred to as annexed), and which, it is averred, the said defendants and the said John A. Griswold, in said month of January, 1870, published in the Elizabethtown Post, a newspaper published in said county of Essex; the said certificate or report being, as said plaintiffs respectively allege, false in a material representation, and known by the said defendants and the said John A. Griswold so to be, namely, in stating that the capital stock of said company had been paid in, in full, when, as the plaintiffs respectively aver, such was not the fact; and that, therefore, by force of the fifteenth section of said act, the said defendants also became liable to the plaintiff, to the amount of their respective claims.

The third counts, after referring to the incorporation of said company, and to the fact that the defendants and said John A. Griswold were the trustees thereof, as aforesaid, respectively set forth that prior to the organization of the said company, the said defendants and the said John A. Griswold entered into an alleged fraudulent scheme, combination and conspiracy, to form said corporation as it was formed, and to fraudulently cause to be transferred thereto, certain lands owned by a corporation, styled the "Kingdom Iron Ore Company," in which company, it is alleged, the defendants and said John A. Griswold were interested as stockholders and officers, and to have the stock of the new company issued to an

amount largely in excess of the value of said lands; and to have the whole of said stock paid to, or for the benefit of, said Kingdom Iron Ore Company (so-called) in part payment of said lands. The counts then proceed with general allegations of acts and doings on the part of said defendants and said Griswold, in furtherance of said alleged scheme and conspiracy, and state, among other things, that the plaintiffs were thereby induced to become creditors of said corporation, winding up with allegations to the effect that the said alleged omission, set forth in the first counts, and the alleged making of said alleged false report, set forth in said second counts, are and were but part and parcel of said alleged scheme or conspiracy, by means of which alleged doings, it is claimed, the defendants became liable to pay the claims of the plaintiffs, respectively.

The defendants, George M. Wheeler and Chester Griswold, in one demurrer, severally demur to said amended complaints, and to each of them, upon various grounds, which are stated in the opinion, and the defendant, Hoysradt, also demurs separately, upon substantially the same grounds.

Wm. O. Holbrook, for the appellants. The first and second causes of action were improperly united. (*Smith v. Hallock*, 8 How., 73; *Sweet v. Ingerson*, 12 id., 331.) The causes of action, united, must affect all the parties to the action. (*Warth v. Radde*, 28 How., 230; *Smith v. Geortner*, 40 id., 185; *Hess v. Buffalo & N. Y. R. R.*, 29 Barb., 391.) The cause of action against the trustees was not assignable. (*O'Donnell v. Seybert*, 13 Serg. & Rawle, 56; *Shoemaker v. Kelly*, 2 Dall., 213; *Weyburn v. White*, 22 Barb., 82; *Merchants' Bank v. Bliss*, 35 N. Y., 412; *Miller v. White*, 50 id., 139; *Robinson v. Weeks*, 6 How., 164; *Lamphere v. Hall*, 26 id., 509; *Yertore v. Wiswall*, 16 How., 8-14; *Quin v. Moore*, 15 N. Y., 435, 436.)

A. Pond, for the respondent. The first and second counts are properly united. (*Merchants' Bank v. Bliss*, 35 N. Y., 412; *McCown v. N. Y. C. R. R.*, 7 Lans., 75; *City of Brooklyn v. Cleves, H. & Den.*, 231; *Deyo v. Rood*, 3 Hill, 527; *Vallances v. King*, 3 Barb., 551.) The third cause of action was properly united with

the others. (*Robinson v. Flint*, 16 How., 240; *Vermeule v. Beck*, 15 id., 333; *Badger v. Benedict*, 1 Hilt., 414; *Borst v. Corey*, 15 N. Y., 505; *Lattin v. McCarty*, 41 N. Y., 107; *Wadley v. Davis*, 63 Barb., 500.)

MILLER, P. J.:

In the first and second actions, I think that the first and second causes of action were properly united. Each of them was for a liability somewhat in the nature of a statute penalty, and, virtually, an action on contract for the recovery of money.* They were therefore properly joined, under section 167, subdivision 2, of the Code. The fact that one of the causes of action is for not making a report within twenty days, as required by section 12,† and the second, for making a false report, does not, I think, alter the case. Each one of the counts contains a separate and an independent cause of action, and either of them may be upheld, if the evidence upon a trial warrants it. They are not necessarily inconsistent with each other or contradictory. Even if a report be filed, which is false within section 15 of the act cited, it by no means follows that there has been a compliance with section 12. A report which is false, can scarcely be said to be a report which is required by section 12, and I am inclined to think that when such is the case, an action may be upheld under section 12, if, for any reason, the proof upon a trial would not warrant a judgment, under section 15.

Nor, in my opinion, is there any question but that each of these causes of action, may arise out of "the same transaction or transactions connected within the same subject of action," within section 167, subdivision 1. The subject of the action of the plaintiff, is the debt, and the transactions connected with it, are the unlawful acts of the defendants. These acts arise out of transactions which relate to, and form a part of, the subject of the action. If, in accordance with the opinion in *Adams v. Bissell*,‡ we disregard the last clause of subdivision 1 of section 167, which I am not prepared to do, I am nevertheless satisfied that each of the causes of action, arises out of the same transaction, and may be maintained.

* *McCoun v. The N. Y. C. & H. R. R. Co.*, 7 Lans., 75.

† S. L. of 1848, chap. 40.

‡ 28 Barb., 336.

If these views are correct, the first ground of demurrer cannot be upheld.

It is insisted that there is a misjoinder of the first and second causes of action, because they do not affect all the defendants, viz.: Hoysradt, Corning and Burleigh, who were not signers of the alleged false report, set forth in the second cause of action in the first two cases; and that there is a misjoinder of the third cause of action with the first and second, for the same reason. These grounds are stated, also, in the second and sixth grounds of demurrer of the defendants, Wheeler and Griswold, respectively, and in the separate demurrer of the defendant, Hoysradt. The Code* provides that the causes of action, united, "must affect all the parties to the action," and the objection of a misjoinder may be taken advantage of by demurrer.†

It is claimed by the plaintiffs, that the complaints allege that all the defendants did sign the report, and the demurrers admit the allegation to be true. The second count in the two cases, avers that the company was duly organized and incorporated, as stated in the first count; that the defendants and Griswold were duly named as trustees, and, while such trustees and acting as such, having accepted the same, the "defendants and said John A. Griswold, on the 13th day of January, 1870, made and filed in the Essex county clerk's office" * * * "a certificate or report, a copy whereof is hereunto annexed, marked B." It also alleges that "said certificate and report was the only report made, filed and published; that said report was false," etc., stating where. It then proceeds to state, "that said defendants and the said John A. Griswold signed said certificate, knowing it to be false as hereinbefore stated," etc. The certificate annexed does not contain the names of the three defendants hereinbefore mentioned. The allegation that they did sign, refers to "said certificate," meaning the one annexed, which negatives the allegation that such was the fact. If the last allegation can be considered as in conflict with what had previously been averred, then the reading of the report or certificate annexed, must, I think, determine how the fact is; and, although

* § 167.

† Warth v. Radde, 28 How. Pr., 230; Smith v. Geortner, 40 id., 185; Hess v. Buffalo & N. Y. R. R. Co., 20 Barb., 391; Palmer v. Davis, 28 N. Y., 246.

verbally a contradiction, yet, as it refers directly to the report, the allegation must be considered as confined and restricted to what appears upon the face of the certificate, a copy of which is annexed; that is, that Griswold and others did sign it, but that the other three defendants did not. It appears, then, that the report and certificate, set forth, was not signed by either of them, and hence they could not be held responsible for its being false. It is no answer to say that the complaints only purport to have annexed to them, a copy of the report and not of the signatures, for it would lack the essential qualities of a report unless it was signed. Besides, the names attached, constitute a part of the report; are first mentioned at its commencement as being trustees, and the report purports to have been sworn to by each one of the signers, before a notary. It is plain, therefore, that there is a misjoinder of actions as to the first and second causes of action and also of the third, which is based on the first and second; and, in this respect, the demurrers are well taken.

The defendants' counsel further insists that the complaint in the Bonnell case, does not state facts sufficient to constitute a cause of action, because it shows upon its face that Bonnell was not an original creditor, but derives his claim only by assignment or transfer from the "Birmingham Iron Foundry." In other words, that the claim was not assignable by the trustees of the "Birmingham Iron Foundry," so as to transfer to Bonnell any cause of action against the defendants, which arises under the twelfth and fifteenth sections of the manufacturing act, by virtue of which a recovery is claimed.* The provisions referred to, provide for a liability of trustees or officers of a company, for *all debts existing or contracted*, without limiting or restricting such liability to the creditor alone, and extend the remedy, I think, for the collection of the debt, against the trustees or officers who neglect their duty, and fail to comply with the law. They do not change the nature of the debt, for which the company was originally, and continues to be, liable nor invest it with a character which presents an assignment of the same, which carries with it all the incidental remedies given by statute. The act embraces "all the debts of the company," which, I think, means debts due, not only to the original creditor, but to

* S. L. of 1848, chap. 40, pp. 54, 57.

such person as may be entitled to the same by virtue of a lawful assignment. Regarding the action as brought upon the contract, and the remedy under the statute, as merely incidental, I am inclined to think that it stands precisely in the same position as any other action of a similar character, which has been lawfully transferred to another party. But, even if this position may be doubted, the plaintiff's cause of action may be considered as embraced within the rule laid down in some of the reported cases, to the effect that a cause of action against a vendee of land, for fraudulent representations as to an incumbrance, or an action for fraudulent representations in obtaining money or property, survives to and against the personal representatives, and an assignee may sue thereon.*

Although the first and second causes of action, set forth in the plaintiff's complaint, do not, perhaps, distinctly show an injury arising from the defendants' wrongful acts, or which tends to affect, impair or diminish the estate of the "Birmingham Iron Foundry," or of the plaintiff, yet it is quite apparent that the unlawful acts of the defendants may have such an effect. The law declares that such an injury may have accrued from the facts stated, and it is a fair and legitimate inference, I think, that the failure of the defendants to comply with the provisions of the statutes cited, may have occasioned and did cause that injury, and seriously affected and impaired the property and estate of the plaintiff or his assignor. It is also a presumption of law, that the debt was contracted in the first instance, and an assignment of the same made with full knowledge of the remedies under the statute, and with entire reliance upon the same. In my opinion, the case now presented, bears no analogy to an action brought to recover damages for personal injuries, which is not assignable for the reason that no one has a property in the personal sufferings of another, and therefore the acts complained of cannot injuriously affect, impair or diminish his estate. The cause of action here, clearly, goes beyond the person. It is a debt incurred for work and labor performed and materials furnished, which, if not paid, diminishes the property of the creditor or of his assignee. If the causes of action are regarded as

* *Haight v. Hayt*, 19 N. Y., 464; *Byxble v. Wood*, 24 N. Y., 607; *Graves v. Spier*, 58 Barb., 349, 335; *Johnston v. Bennett*, 5 Abb. P. R. (N. S.), 331.

brought for mere penalties, then—some of the later cases hold—the right of action is assignable, and not a mere personal privilege.* As the statute does not prohibit the assignment of a claim like that for which the plaintiff seeks to recover, but appears to favor the right to assign, and as such right is not in conflict with any principle of law, and is upheld by the reported cases, my conclusion is, that the grounds of demurrer, last considered, are not well taken, except as to the defendant, Hoysradt, who, as we have already seen, was not a signer of the certificate, and therefore cannot be made liable under the second cause of action.

There was no misjoinder of the third cause of action with the first and second causes of action, so far as the substance of the same is concerned, and I see no difficulty in regard to them. The question presented in regard to this branch of the case, was passed upon in *Arthur v. Griswold*,† and it is there held, that, although the causes of action are different, they are to be deemed properly united and they relate to the same general transaction.

In the third and fourth actions, the complaints against the executors are of the same general character, as in the first and second actions, except that the cause of action alleging a conspiracy, being the third cause of action in these two cases, is omitted. The observations already made cover all the objections urged, and, as none exists which is fatal to a recovery, the demurrer must be overruled as to these.

In the first and second actions, the order appealed from must be reversed, with ten dollars costs; and the defendants are entitled to judgment on the demurrer, with leave to the plaintiff in each to amend, upon payment of costs, within twenty days after a service of a copy of the order herein. In the third and fourth actions, the order must be affirmed, with ten dollars costs. Judgment must be ordered for the plaintiffs upon the demurrer, with leave to the defendants to answer within twenty days after service of a copy of the order herein, and upon payment of costs.

Present—MILLER, P. J., and BOARDMAN, J.

Ordered accordingly.

* *Meech v. Stoner*, 19 N. Y., 36; *McDougall v. Walling*, 48 Barb., 364.

† See MS. opinion of CHURCH, Ch. J., in Court of Appeals.

THOMAS P. DEYOE, RESPONDENT, v. THE VILLAGE OF
SARATOGA SPRINGS, APPELLANT.

Chapter 763, Laws of 1872 — Commissioners of water-works appointed under — village responsible for acts of — Streets — duties of village as to repairs of.

The plaintiff was injured by driving into a ditch in one of defendant's streets, made by the commissioners of water-works, for the purpose of making repairs to pipes, etc., and which had been left unguarded. *Held*, that the defendant was liable; that the commissioners were subordinate to the defendant, to which the water-works belong, and that the commissioners are merely the agents of the defendant, in their construction and maintenance.

Seem, that even if this were not so, the defendant would be liable, on the ground that it was its express and exclusive duty to keep in repair the streets of the village, and that as the superintendent of the water commissioners, under whose direction the work was done, was also the superintendent of streets, his knowledge was the knowledge of defendant.

APPEAL from a judgment, entered upon the verdict of a jury, after a motion for a new trial made by the defendant upon the minutes of the judge presiding at the trial.

Plaintiff, with his horses and carriage, drove into an open ditch in one of defendant's streets, whereby he suffered damages. The ditch had been opened by the commissioners of water-works, for the purpose of making repairs to pipes, etc., and had been left unguarded by them during the night, whereby plaintiff was injured. The commissioners of water-works were appointed by the legislature,* and to such commissioners is given, by the act, the management and control thereof. The defendant's superintendent had the supervision of the streets and highways of the village, subject to the control of the trustees, who possess the usual powers and duties as to the streets. Such superintendent was also foreman or superintendent of the commissioners of water-works, and, as such, caused this excavation in the street to be made.

At the close of the plaintiff's evidence, defendant moved for a nonsuit, upon the ground, substantially, that if any cause of action had been proved, it was against the commissioners of water-works and not against the village of Saratoga Springs. The motion was denied, and defendant excepted.

* Laws of 1872, vol. 2, p. 1819.

P. H. Cowen, for the appellant, cited *Hutson v. Mayor, etc.* (9 N. Y., 163); *Davenport v. Ruckman* (37 id., 568); *Wendell v. Mayor, etc.* (39 Barb., 329); *Bailey v. Mayor, etc.* (2 Denio, 433-442); *Williams v. Village of Dunkirk* (3 Lans., 44); *Bank of Commonwealth v. The Mayor* (43 N. Y., 188).

John Foley, for the respondent, cited *Bailey v. The Mayor, etc.* (3 Hill, 531); *Rochester White Lead Co. v. City of Rochester* (3 N. Y., 463); *Starrs v. City of Utica* (3 Smith, 104); *Barton v. City of Syracuse* (37 Barb., 292); *Hyatt v. Trustees of Rondout* (44 Barb., 385); *Diveny v. City of Elmira* (51 N. Y., 506); *Wendell v. Troy* (4 Keyes, 272); *Davenport v. Ruckman* (37 N. Y., 568).

BOARDMAN, J.:

Before the act of 1872, the water-works of Saratoga Spa had been substantially completed, except extensions. By that act, five water commissioners were appointed, to whom were given the management and control of the water-works and their appurtenances. The defendant's trustees appointed, or were to appoint, their successors. The commissioners have power to appoint a superintendent. The trustees are required to raise money by tax, in accordance with the commissioners' estimate, and pay the same to the commissioners. The commissioners are required to make a report of their proceedings to the trustees when required. By a vote of two-thirds of the trustees, an action may be begun against the commissioners for any misfeasance, malfeasance, or default in the discharge of their duties. The defendant's trustees are further required to issue \$50,000 of bonds, for the extension and completion of the water-works and paying indebtedness therefor, to be delivered to said commissioners. By the acts of 1872 and the acts of 1868, chapter 557, 1869 chapter 264, and 1870, chapter 31, it is apparent that the water-works belong to, and are the property of, the defendant, and that the commissioners are merely the agents of the defendant in their construction and maintenance. The commissioners are responsible to the village corporation for the proper discharge of their duty. The commissioners and village are not two separate and independent bodies, but the former is subordinate to the latter. The commissioners owe no duty to individuals, in

respect to the highways of said village, and, as a consequence, are not responsible to individuals for any neglect of duty in that respect. The authority for the construction and maintenance of the water-works, was for the benefit and advantage of the defendant, and not the commissioners. The defendant, having accepted such provision, has accepted the agents appointed for it by the State, and becomes responsible for their acts, as if appointed by itself.* By these cases, it is evident that the defendant would be held liable, notwithstanding the *quasi* corporate character of the commissioners, upon the theory that such commissioners were acting for the defendant, and without any personal interest or profit to themselves. But it is believed that the defendant may be made liable, upon the further ground that it was the express and exclusive duty of the defendant, to keep in repair the streets of said village; this was not done. The superintendent of the water commissioners was also the superintendent of highways of the village, whose duty it was to keep the streets in repair, or, in case they were necessarily out of repair, to so guard and protect the public, that no injury should come therefrom. This superintendent directed this excavation to be made, and knew of its existence. His knowledge was the knowledge of the defendant. By his neglect to repair the highway or guard against accident, the defendant became liable for plaintiff's damages.†

The judgment and order appealed from should be affirmed, with costs.

Present—MILLER, P. J., BOCKES and BOARDMAN, JJ.

Judgment affirmed, with costs.

* Bailey v. Mayor, &c., 3 Hill, 531; affirmed 2 Den., 433; Conrad v. Village of Ithaca, 16 N. Y., 158, and note, p. 161; Diveny v. City of Elmira, 51 N. Y., 506.

† Davenport v. Ruckman, 37 N. Y., 568; Hutson v. Mayor of New York, 9 N. Y., 163.

RICHARDSON H. THURMAN, APPELLANT, v. HENRY W. MOSHER, RESPONDENT.

Fraudulent representations— not alleged in complaint— cannot be proved at trial— deposition— requires of— memoranda— when admissible.

This action was brought to recover for alleged false and fraudulent representations, made by the defendant, whereby the plaintiff sustained damage, the complaint containing particular, specific charges of fraud. At the trial, plaintiff offered to prove false and fraudulent representations, made by the defendant, other than those alleged in the complaint. *Held*, that the evidence was properly excluded; that the defendant was not called upon to meet other charges than those of which he had notice in the pleadings.

Where the charge to be substantiated is, that the *intent* with which the act was done, was fraudulent, any transaction or statement of a fraudulent character, bearing on the motive of the party accused, becomes competent evidence. But where the charge is, that the party did a specific fraudulent act, or made a certain false statement, which gave a right of action, the act or statement must be proved substantially as alleged in the pleading, and proof of other fraudulent transactions is irrelevant and improper.

The defendant was examined by the plaintiff, as a witness, before the trial, but his examination was neither read over to, nor signed by him; nor was it certified by the judge before whom it was taken, nor filed with the clerk. At the trial, the stenographer having been called, and having testified that the paper produced was the evidence as he took it down, and that he believed it to be correct, the plaintiff offered to read it in evidence. *Held*, that it was properly excluded. That it was not admissible as a deposition, because the requirements of the statute had not been complied with; nor was it admissible as a memorandum, for the reason that it did not appear but that the witness could have stated what the defendant swore to on his examination, from recollection, or, after refreshing his memory, by reading over the paper. *Butler v. Benson*, 1 Barb., 528; *Lawrence v. Barker*, 5 Wend., 801; *Huff v. Bennett*, 6 N. Y., 337, examined and limited. The decisions as to the introduction of memoranda in evidence, collated.

The plaintiff was entitled to prove the statements and admissions, made by the defendant at the time of his examination, but the paper itself was not, under the circumstances, admissible.

APPEAL from a judgment in favor of the defendant, entered upon the verdict of a jury.

This action was brought by the plaintiff against the defendant, Mosher, and one Edward Tracy, to recover for alleged false and fraudulent representations, made by the defendant, Mosher, to the plaintiff concerning the stock and property of the Heydrick Oil

Company, a corporation organized under the laws of the State of Pennsylvania, by which representations, the plaintiff alleged that he was induced to transfer to the defendant, Tracy, certain lots of land in the city of Brooklyn, of the value of \$3,000, and to take from said Tracy, as consideration therefor, 300 shares of the stock of said Heydrick Oil Company, at ten dollars per share, and that said stock was in fact worthless, and the plaintiff suffered damage to the amount of \$3,000 and interest; that the defendant, Tracy, well knew of the representations made by the defendant, Mosher, and that the same were false; and that the defendants combined and confederated together, to deceive and defraud the plaintiff for the benefit of said Tracy.

Before the action was brought to trial, the plaintiff discontinued as against the defendant, Tracy, and proceeded against the defendant, Mosher.

The action was brought to trial at the Rensselaer circuit, in December, 1872, when evidence was given by both parties, bearing on the issues presented by the pleadings, and a verdict was rendered by the jury in favor of the defendant; judgment was thereupon rendered, and the plaintiff appealed to the General Term.

The questions raised on the appeal, relate entirely to the exclusion of evidence offered by the plaintiff on the trial. The plaintiff offered to show alleged false and fraudulent representations, other than those charged and counted on in the complaint. The court excluded the evidence, and the plaintiff excepted.

The plaintiff also offered to read in evidence the examination of the defendant, taken before trial, in this case, under an order made pursuant to section 391 of the Code, which examination was not completed, nor was the testimony, so taken, signed by the party, certified by the officer, or filed with the clerk. The plaintiff's counsel admitted that the testimony or deposition was not signed or filed, so as to entitle it to be read as evidence without proving it, but offered to read it in evidence as an admission of the defendant. The defendant objected to it as immaterial and incompetent; that it was not properly authenticated, was not read over to the defendant or signed by him, and was never filed. The court sustained the objection, and the plaintiff excepted to such ruling.

E. F. Bullard, for the appellant. The court erred in rejecting evidence of the fraudulent representations. (*Amsden v. Manchester*, 40 Barb., 158; *Meyer v. Goedel*, 31 How., 456; *Hall v. Naylor*, 18 N. Y., 588; *Hier v. Grant*, 47 id., 278; *Hunter v. H. R. Iron Co.*, 20 Barb., 493, 501; *Bliss v. Cottle*, 32 id., 322; *Fullerton v. Dalton*, 58 id., 236.)

Ezek Cowen, for the respondent. The evidence of false representations, other than those set forth in the complaint, was properly excluded. (*Gray v. Palmer*, 2 Robertson, 500; *Wells v. Jewett*, 11 How., 242; *Barber v. Morgan*, 51 Barb., 116; *Cary v. Hotailing*, 1 Hill, 311.) The examination of the defendant, before trial, was properly excluded. (*Barry v. Galvin*, 37 How., 310; *Greene v. Herder*, 7 Rob., 461.)

BOOKES, J.:

There was no error, I think, in the exclusion of the alleged false and fraudulent representations made by the defendants, other than those counted on in the complaint. The action was based on particular, specified charges and allegations of fraud; on those the plaintiff counted, and on those he must rely. The defendant was required to answer those, and none other. He was not called upon to meet other charges and statements than those of which he had notice in the pleading.*

There is an obvious distinction between those cases where specific charges of fraud are made the basis of a recovery, and those where a fraudulent intent constitutes the gravamen of action; as when the question is, whether the vendee of goods procured them with the fraudulent intent not to pay for them. A sale and delivery of goods to a vendee, who purchases with the preconceived design not to pay for them, is fraudulent; and, on an issue as to such intent, it is competent, with a view to show the *quo animo*, to prove that the party accused was engaged in other similar frauds, at or about the same time. Then, such other frauds become evidence in support of the charge of fraudulent purpose and intent. The evidence bears on the motive of the party, which, if fraudulent, of itself makes the sale and delivery void. When the charge

* 11 How., 242; 51 Barb., 116; 2 Rob., 500.

to be substantiated, is, that the *intent* with which the act was done, was fraudulent, any transaction or statement of a fraudulent character, bearing on the motive of the party accused, becomes competent evidence. But, when the charge is, that the party did a specific, fraudulent act, or made a certain false statement, which gave a right of action, the act or statement must be proved, substantially, as alleged in the pleading, and proof of other fraudulent transactions is irrelevant and improper. The offers to prove false representations and fraudulent transactions against the defendant, other than those counted on in the complaint, were properly rejected.

The offer of the plaintiff to read the examination of the defendant, taken pursuant to section 391 of the Code, is now to be considered. It is conceded that the examination could not be read as evidence in the case, like the deposition of a party taken *de bene esse*, for several reasons. It was not complete; was not read over to, and signed by the party examined; was not certified by the officer; nor had it been filed. Had these requirements been duly complied with, the examination would have been evidence, of itself, to be used on the trial by either party, at his option.* There was no statute which authorized it to be read in evidence, in the form in which it was presented. Therefore, as a deposition, and of itself, it was incompetent evidence. This was conceded by the plaintiff's counsel. He said: "I admit it has never been signed and filed, so we could read it without proving it." But he offered "to read the evidence of said defendant, so taken, against him, as an admission in the case." Now, I am unable to discover any legal objection to proof, by the plaintiff, of what the defendant stated on the occasion of his examination. The plaintiff had a right to prove his statements and admissions, bearing on the issues, whenever and wherever uttered. That he made them under oath and in a legal proceeding, affords no reason why they might not be proved against him. So it was undoubtedly competent for the plaintiff to call the stenographer who took down the defendant's examination, or any other person who heard him speak, and prove what he then stated. The stenographer was called in this case, and testified that he took down the examination, which he then produced or held in his hand; said it was the evidence as he took it, and that he believed it to be correct. The

* 37 How., 310.

plaintiff's counsel then offered to read the examination in evidence, when the objections were interposed, that it was incompetent, immaterial and not properly authenticated; that is, that the paper itself was incompetent evidence. Now, the written paper was not evidence *ipso facto*, but was a memorandum made by the witness which might be used, if necessary, in aid of his recollection. The question to the witness should have been, What did the defendant state on that examination? If he could answer without recourse to the memorandum, he should do so. To adopt the language of WOODRUFF, J., in *Young v. Catlett*: * "There would be no propriety in putting into the hands of a witness a paper for the purpose of refreshing his recollection, when his memory is already fresh, and his recollection full on the subject of inquiry," and, the learned judge adds, in substance, that to do so under such circumstances would be improper. If unable to answer without recourse to the paper, he might resort to it in aid of his memory. But the right to recur to it, in aid of his recollection, would not make the memorandum evidence, of itself. It was said in *Butler v. Benson*, † that a witness might use a memorandum to refresh his recollection, but that it was not evidence to go to the jury, even though he should swear that he thought it correct; and it is added, *per HAND, J.*: "He may refresh his memory, and then, if his recollection recalls the transaction, that recollection is testimony to go to the jury. * * It is not sufficient that his mind recurs to the memorandum, and that he himself believes that true." This case followed substantially the decision in *Lawrence v. Barker*, ‡ and both of these cases were cited with approval, in *Huff v. Bennett*.§ The rule laid down in these cases, would absolutely exclude the reading of a memorandum in evidence, under all circumstances. It would permit a paper to be used by the witness to refresh his memory, yet, after recurring to it, he would be required to speak to the facts from his recollection.

But the rule has been so far modified, as to permit a memorandum to be read in evidence, under certain circumstances. | The rule, as settled in these and other recent cases, is to the effect, that a

* 6 Duer, 441. † 1 Barb., 526. ‡ 5 Wend., 301. § 6 N. Y., 337.

| *Halsey v. Sinsebaugh*, 15 N. Y., 485; *Russell v. The H. R. R. Co.*, 17 id. 184; *Guy v. Mead*, 23 id., 462; *McCormick v. Penn. Cent. R. R. Co.*, 49 id. 303, 315.

memorandum of a fact, material to the issue, made by a witness at or near the time when the fact occurred, may be read in evidence to the jury. 1st. If the witness can swear that it was made correctly; and, 2d. That he cannot remember the fact, except as he finds it stated in the paper. So it was held in *Russell v. The H. R. R. Co.*,* that a memorandum, made by a living witness contemporaneously with the facts to which it relates, is admissible in evidence only as auxiliary to, and not as a substitute for, his oral testimony; and, that it must appear that there is a necessity for its introduction, on account of the inability of the witness to recollect the facts after refreshing his memory by the writing.

In this case, Judge SELDEN says, that it is an indispensable preliminary to the introduction of such memorandum, that it should appear that the witness is unable, with the aid of the memorandum, to speak from memory, as to the facts; and, further, that it is the duty of the court, in all such cases, to see, before receiving the evidence, that there is a necessity for its introduction, on account of the inability of the witness to recollect the facts. Thus it seems that the memorandum is inadmissible, unless the witness states that he has no recollection of the facts which are the subject of inquiry, aside from the written paper. The following cases, in addition to those above cited, bear on this point.† In *Russell v. The H. R. R. Co.*,* the memorandum was admitted in evidence against objection, and a new trial was granted on the ground, that, for aught that appeared, the witness had a distinct recollection of all the facts, independent of the written paper.

Now, in the case at bar, the witness stated that he took the minutes, as he believed, correctly; but he did not swear to any want of memory as to what the party testified to; did not say that he could not give what the party then stated, except from the minutes; did not show that it was at all necessary for him to recur to them in aid, even, of his recollection. For aught that appeared, he could have stated what the defendant then swore to, without

* *Supra*, 17 N. Y., 134.

† *Meacham v. Pell*, 51 Barb., 65, 67; *Brown v. Jones*, 46 id., 400, 410, 411; *Woods v. De Figanieri*, 25 How. Pr., 522-526; *Stuart v. Binsse*, 7 Bosw., 195-197; *Wheeler v. Ruckman*, 1 Robt., 408-411.

any aid from the minutes. If he could have done so, there was no occasion to refer to them.

It seems, therefore, that the paper, of itself, was incompetent as evidence, and the offer to read it to the jury was properly overruled.

Had the offer been this: to prove by the witness what the defendant stated or testified to, on the occasion of his examination, its exclusion would, I think, have been error. But the offer was to prove facts, competent to be proved, by incompetent evidence. That was inadmissible. Both the facts to be proved, and the evidence offered to establish them, must be competent or the offer should be rejected.

The above considerations embrace the principal grounds of error presented for examination; and, as we think, the only grounds of alleged error which require particular notice.

MILLER, P. J., and BOARDMAN, J., concurred.

Judgment affirmed, with costs.

BENJAMIN SNYDER, RESPONDENT, v. ELIAS C. DAVIS,
APPELLANT.

Exemption — Chapter 157, Laws 1842 — when property specified in, is exempt.

All the articles specified in chapter 157, of the Laws of 1842, are liable to seizure and sale on an execution issued to collect the purchase-money of any one of the articles therein specified, or of any other property, which was, at the time of the passage of said act, exempt from execution.

The case of *Hickox v. Fay*, 86 Barb., 9, not followed; *Smith v. Slade*, 57 Barb., 687, distinguished.

APPEAL from a judgment in favor of the defendant, entered upon the trial of the cause at circuit, where the plaintiff was nonsuited. The facts are stated in the opinion.

H. B. Cushney, for the appellant.

Peter G Webster, for the respondent.

BOOKES, J. :

The question in this case arises under the exemption act of 1842, amended in 1859, and again in 1866.* The sale was made by the defendant, as constable, under an execution against the plaintiff, issued on a judgment rendered for the purchase-money of a cow; which cow was exempt property under the provisions of the Revised Statutes of 1830. The property sold was a horse, harness, wagon and sleigh; and it is conceded that such property was exempt under the act of 1842, and the amendments thereof, unless it comes within the proviso of the last clause, which reads as follows: "Provided that such exemption shall not extend to *any* execution issued on a demand for the purchase-money of such furniture, tools, * * * or the articles now enumerated by law." Now, the act of 1842 extended the exemption declared by the Revised Statutes, to certain other property therein specified (to the property sold in this case), subject to the proviso above stated. This proviso was, that this act of 1842, should be ineffectual as to any execution issued on a judgment for the purchase-money of the property thereby exempted, or for the purchase-money of "the articles now enumerated by law." The cow, for the purchase-money of which the judgment was recovered, was one of those articles.† Therefore, by force of the proviso, the act of 1842 was ineffectual as to the exemption here claimed. The language of the proviso is specific and clear; it provides that such exemption shall not extend to any execution issued on a demand for the purchase-money of "the articles now enumerated by law." Those articles were, "all sheep to the number of ten, * * * one cow, 'two swine,' etc. ‡

Now, the property here sold was not exempt by the Revised Statutes of 1830, nor by the act of 1842 giving effect to its proviso, inasmuch as the execution, on which the sale was had, issued "on a demand for the purchase-money" of an article there enumerated by law as exempt; and, in the absence of any law exempting the plaintiff's property, it was liable to seizure and sale on execution issued on a judgment rendered against him. This exposition of the exemption act of 1842 and its amendments, has sanction

* Laws of 1842, chap. 157; 1859, chap. 184; 1866, chap. 782.

† 2 R. S., 367, § 22, sub. 4.

‡ Id.

also in *Cole v. Stevens*, * where SELDEN, J., remarks that "the natural reading of the clause seems clearly to be that the exemption allowed by *the section itself*, shall not be available against any execution issued to collect the purchase-money of any exempt property whatever." † I am of the opinion that the seizure and sale of the plaintiff's property, in this case, was justified in law; and the nonsuit was, consequently, right.

I am not unmindful of the decision in *Hickox v. Fay*, ‡ which is relied on by the appellant's counsel, where it was held that an execution issued on a judgment, recovered on a demand for the purchase-money of exempt property, must follow the identical property sold, "as if the party selling retained a specific lien thereon for the price." But this decision was overruled, or rather was not followed, in *Craft v. Curtiss*, § and has not been regarded as sound. The question here under consideration, was not before the court, in *Smith v. Slade*. |

The nonsuit in this case was right, and the judgment should be affirmed, with costs.

MILLER, P. J., and BOARDMAN, J., concurred.

Judgment affirmed, with costs.

SAMUEL D. HOPKINS AND OTHERS, PLAINTIFFS, v. MARY L. HOPKINS AND DRUZILLA HOPKINS, DEFENDANTS.

Will—Construction of—Remainder—when vested.

Susan Hopkins died, leaving a will, by which she devised the use and income of all her estate, both real and personal, to two of her daughters, so long as they should live and remain unmarried, and upon their death or marriage, she devised all the rest, residue and remainder of her estate to her children, naming them, or to the survivor or survivors of them; and, "in case any of my children die, having issue, then I will and direct that the child or children of such son or daughter

* 9 Barb., 676. † See also 10 Barb., 91. ‡ 36 Barb., 9. § 25 How., 163.

| 57 Barb., 637; see also 14 How., 519, and 8 Denio, 52.

of mine, shall receive the same as the parent of such grandchild would have received if living." *Held*, that the children named in the will, took vested estates in remainder, immediately upon the death of the testatrix.

CASE submitted on a statement of facts, agreed upon by the parties, under section 372 of the Code.

Susan Hopkins died, prior to May, 1873, leaving a last will and testament, which was admitted to probate, May 8, 1873, and letters testamentary issued thereon to Samuel D. Hopkins and Travis Hopkins, the executors therein named. The will contained, among others, the following provisions: "I give, devise and bequeath to my two daughters Druzilla Hopkins and Mary L. Hopkins, during their natural lives, if they remain unmarried, the use and income of all my real and personal estate of every name and nature. In case either of my daughters should marry, then I will and direct the daughter unmarried, shall have the use and annual income of all my real and personal estate of every name and nature, during her natural life, or so long as she shall remain unmarried, my design being to provide a comfortable home for my unmarried daughters, so long as they live. In the event of the death or marriage of my said daughters, Druzilla and Mary L., I give, devise and bequeath the rest, residue and remainder of my estate, to my children, Travis Hopkins, R. Anne Pease, H. Jane Bishop, Anor H. Potter, John Q. Hopkins, Druzilla Hopkins, Mary L. Hopkins and Samuel D. Hopkins, or to the survivor or survivors of them. In case any of my children die, having issue, then I will and direct that the child or children of such son or daughter of mine, shall receive the same as the parent of such grandchild would have received if living—that is, the portion that would have belonged to the parent, if living."

The plaintiffs, Travis Hopkins, Samuel D. Hopkins, Anne Pease, Hannah J. Bishop and Anor Potter, made a contract with the defendants, to sell and convey all their interest in the lands of the testatrix, devised by the will, on the 29th of November, 1873. The deed was to be delivered on the 19th of December, 1873, at which time, the deed, having been properly executed, was tendered to the defendants. They declined to accept the same, for the reason that, as they claimed, the grantors could not and did not convey by said deed, the lands according to the contract, viz., a perfect title in fee simple

absolute, including the interest that the defendants acquired under the will of said Susan Hopkins.

J. De Motte Smith, for the plaintiffs.

F. M. Finch, for the respondents.

MILLER, P. J.:

The question to be determined under the testatrix's will, is, whether the devise to her children, after the termination of the devise to her two daughters, was a vested or a contingent remainder. By the will, she devises to the two daughters, Druzilla and Mary, an estate during their lives, provided they remain unmarried, and upon the termination of this estate, the remainder to the children named in the will, or the survivor or survivors of them. Did the will stop here, there would be no difficulty in construing it, as such children, or the survivor or survivors, would most clearly be entitled to a vested estate. But the clause following, which provides that if any of the children die, having issue, that such issue shall receive the same as the parent would have received if living, raises a question which is not entirely free from embarrassment. There are certain legal rules, however, applicable to cases of this character, which must lead to a rational interpretation of the instrument now to be construed. It is provided by statute, that estates are vested, when there is a person in being who would have an immediate right to the possession of lands, upon the ceasing of the intermediate or precedent estate, and contingent, whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain.* Chancellor KENT says: "An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment."† I think that the will of the testatrix gave an estate to the children last named in the same, which entitled them to the possession of the land, upon the determination of the estate of the two daughters who were first entitled to an estate therein, and that it was an existing right to enjoy the same upon the marriage or death of said daughters.

* 1 R. S., 733, § 13.

† 4 Kent Com., 202.

Where real estate was devised to one for life, and after his death, to three others, or to the survivor or survivors of them, their or his heirs or assigns forever, it was held that the remainder-men take a vested interest at the death of the testator, and that the words of survivorship refer to the death of the testator, and not to the death of the tenant for life, unless, from other parts of the will, it be manifest that the intent of the testator was otherwise.* The case at bar bears a striking analogy to the one cited, and the language is of the same import, with the exception that the words, "heirs or assigns forever," are not employed. This, I think, does not alter the meaning, and it is equally plain and explicit without the use of these words. The devise, beyond any question, gave to the children of the deceased, who were named, and living at the time of the testatrix's death, a remainder in the estate, which then became vested in them. The subsequent provision for the issue of such as might die, was, in my opinion, intended to provide for the disposition of the share or shares of such child or children, as might not be living at the time of the testatrix's decease. It was in fact equivalent to a provision for the heirs or assigns of the deceased child or children. Without this clause, I am inclined to think that the portion of such one or more, as might die without issue, would go to the survivor or survivors, and thus prevent the issue of the deceased devisee from participating, in any way, in the final division of the estate. This could never have been intended, and the testatrix sought to, and did, I think, avoid any such result by the provision now considered; thus making an equal distribution among her children and grandchildren and harmonizing the entire plan and structure of the will. The whole will related to, and had in view, such of her lawful descendants, who were named, as might be living upon the decease of the testatrix. If we regard the last clause as an independent provision, I think we must arrive at the same conclusion; for it is after all a devise to the heirs-at-law of the deceased. The grandchildren, in case of the decease of the children, would inherit according to law, and a devise to the children, and in case of death, to the grandchildren, amounts to, and really is, a devise to the person and his or her lawful heirs.

* Moore v. Lyons, 25 Wend., 119.

The intention is a leading element to be considered in the construction of wills, and it is hardly to be assumed that the testatrix designed to make no provision for the grandchildren, in case of the death of any child or children before her decease, and only sought to secure the final distribution to such of them as should survive their parents, who died after her decease.

Another rule may be invoked in support of the construction stated, and that is: that the law favors the vesting of estates, and, unless the intention is unequivocally expressed to the contrary, it will not be imputed to the testatrix.* It cannot be said, in the case at bar, that any intention whatever is expressed by the testatrix, that the estate devised shall not be vested, and every intendment is, as we have seen, in a contrary direction. As was said by the chancellor in *Moore v. Lyons*,† “A remainder is not to be considered as contingent in any case, where it may be construed to be vested consistently with the intention of the testator.” It is apparent that it is entirely in accordance with the object, purpose and design of the testatrix in this case, that the remainder devised, was not considered as dependent, in any way, upon contingencies, but vested, upon the testatrix's decease.

The result of the discussion had, leads to the conclusion that the plaintiffs had a vested remainder in fee, to the real estate mentioned in the deed, to the extent of their several shares; that they had lawful authority to execute and deliver a deed of conveyance of the same; and that the defendants, the purchasers, would thereby acquire an absolute estate in fee, to the interest conveyed.

This, I think, with the estate which the defendants had acquired by virtue of the will, would vest them with an estate in fee simple, of the whole premises.

The defendants, therefore, should be required to perform the contract, and a judgment must be ordered accordingly, with costs.

Present—MILLER, P. J., BOCKES and BOARDMAN, JJ.

Judgment for plaintiffs, with costs.

* *McKinstry v. Sanders*, 2 N. Y. [S. C.] R., 181, 186; citing *Manice v. Manice*, 43 N. Y., 368.

† *Supra*, at page 144.

JOHN H. WHITE, RESPONDENT, v. JAMES E. COULTER AND
AMELIA ANN COULTER, APPELLANTS.

Sale on foreclosure—when set aside—Special Term—place of holding—Lis pendens—affidavit of filing—effect of defect in—Referee—nomination of, by one party—Wife of mortgagor—failure to serve summons on—effect of—Execution—direction on—when sufficient.

A motion to set aside a sale on foreclosure, is addressed to the discretion of the court below, and, in the absence of abuse of such discretion, the order of the Special Term is not appealable.

Where property, the market value of which, on the day of sale, was not above \$40,000, was bid in by the mortgagee for \$35,000, the mortgagor having notice that he would not bid above that for it, and there was no pretense of fraud, misconduct or surprise, a resale should not be granted.

Where an action was noticed for trial, at a Special Term to be held at the chambers of a justice of the Supreme Court, in the town hall, and, at the appointed time and place, the action was, by the consent of the parties, tried before another justice, at an adjourned Special Term then held by him in another room of the town hall; *held*, that if there was any irregularity in so doing, it was waived by the appearance and consent of the defendant's attorney.

The appointment, by the court, of a referee, nominated by one party and approved by the other, is no violation of rule 73, and no irregularity.

Where a judgment of foreclosure, in an action tried before the court without a jury, was entered within four days of the filing of the decision; *held*, that the defendant, by consenting to the entry and subsequently allowing the sale to be confirmed, waived the irregularity, if any existed.

This provision of the Code is so far directory, that a neglect of it will not be considered, in the absence of wrong or injury to the defendant. (*Per* BOARDMAN, J.)

Where the affidavit of filing of notice of pendency of action is defective, but proper notice has, in fact, been duly filed, and no objection is made, by defendant's attorney, to the sufficiency of the proof, the judgment is not thereby rendered void; it is a mere irregularity, which may be disregarded or amended, under sections 173, 176 of the Code, in the absence of any injury to defendant.

The notice of *lis pendens* is made by statute, constructive notice to persons claiming under the defendants in the action, but not parties to it; as their rights only are affected, it is reasonable that they only should be allowed to take advantage of the omission to file it.

Whether, in an action to foreclose a purchase-money mortgage, service of the summons upon the husband is not good as to the wife, and whether she will not be bound by the judgment entered therein, *quere*.

But, if such service does not bind the wife, then her rights are not foreclosed, and if she shall survive her husband, whereby her inchoate right of dower would ripen into an absolute right in the equity of redemption, she may then take pro-

ceedings to enforce her rights, and will not be bound by a judgment, to which, she was not a party. But such non-service furnishes no ground for an application to set aside the judgment, during the lifetime of the husband.

An execution was issued and delivered to the sheriff of Saratoga county, in the usual form, except that, on the inside, it was directed "To the sheriff of the county of county;" on the outside, under the title of the action, were the words, "execution to Saratoga county," with the usual directions to levy, etc. *Held*, that its direction to the sheriff of Saratoga county sufficiently appeared.

THIS is an appeal by the defendants from an order of the Special Term, made on the 18th day of November, 1873, denying defendant's motion to set aside the judgment of foreclosure and the sale had pursuant thereto in the above-entitled action, with ten dollars costs to plaintiff.

By the defendant's notice of motion, dated March 18, 1873, an order was asked, setting aside such judgment and for a new trial, on such terms as might be just, and also on irregularities, as follows:

1. That the trial was irregular as to time and place, and the court had no jurisdiction, for that reason, of the parties or cause of action, the attorney for defendant J. E. C., having no authority to waive the objection.

2. That the affidavit of filing of notice of *lis pendens* was defective.

3. That the appointment of the referee to sell, at plaintiff's request, was irregular and void, and the fee retained by him was excessive.

4. That the direction to sell in one parcel was improper.

5. Defendant J. E. C., asks leave to serve an amended answer.

6. Defendant A. A. Coulter, asks that all proceedings as to her, be set aside, because she was not served with the summons, and never appeared or authorized any one to appear for her in the action.

By the second notice of motion, dated March 24, 1873, the following additional irregularities were alleged:

7. That the judgment was entered irregularly, within four days after the decision of the judge who tried the action.

8. That there was no reference to inquire whether the premises should not be sold in parcels, as required by the rules.

By the third notice of motion, it was asked that the judgment

for deficiency, \$18,911.94, be vacated, for the following reasons and irregularities, to wit:

9. That it was prematurely entered, as in No. 7, *ante*.

10. That it was entered before the end of eight days after the filing of the report of sale.

And the execution upon said judgment was asked to be set aside:

11. Because, it was prematurely issued, before the end of eight days after the filing of referee's report of sale.

12. Because not directed to the sheriff of Saratoga county, or any other sheriff.

13. Also, that the judgment, sale and all proceedings be set aside, on account of the fraud of plaintiff, as alleged.

All errors, defects and irregularities, disclosed by the moving papers, are insisted upon in favor of the motion, and such further and other relief as shall be just, is asked for.

The action was noticed for trial at a regular Special Term, duly advertised and held at the town hall, in the village of Saratoga Springs, by Mr. Justice BOKES, on the 9th day of July, 1872. On that day, another Special Term was also held, in another room of the town hall, by Mr. Justice JAMES, he having adjourned the Ballston Special Term of May, to that time and place. The action was, at the suggestion of Mr. Justice BOKES, the defendant's attorney consenting thereto, tried before Mr. Justice JAMES.

Upon hearing of these motions, they were denied, and defendants appeal from the order denying the same. The facts are stated in the opinion.

A. Pond, for the appellant. The judgment should be set aside as the summons was not served on defendant, A. A. Coulter. (*Bean v. Mather*, 1 Daly, 440; *Williams v. Van Valkenburg*, 16 How., 150; *Bulkley v. Bulkley*, 6 Abb., 307; *Goggs v. Lord Huntingtower*, 12 M. & W., 502; *Baldwin v. Kimmel*, 16 Abb., 353; *Mills v. Van Voorhies*, 20 N. Y., 412; *Brackett v. Baum*, 50 id., 8, 11, 12.) The Special Term, at which the trial was had, was irregular, and the consent of the parties conferred no jurisdiction. (*Kelly v. Thayer*, 34 How., 163; *Dedrick v. Richley*, 19 Wend., 108; *Northrup v. The People*, 37 N. Y., 203; *The*

People v. Moneghan, 1 Park. Cr., 570; *Burckle v. Eckhart*, 3 N. Y., 137.) The affidavit of the filing of the *lis pendens* was defective. (*Same v. Morse*, 6 How., 344; *Cook v. Staats*, 18 Bar., 407.)

Esek Cowen and *L. B. Pike*, for the respondent. The Special Term, at which the trial was held, was regular. (*Hunt v. Wallis*, 6 Paige, 374; *Garcie v. Sheldon*, 3 Barb., 232; *Wilcox v. Wilcox*, 14 N. Y., 575.) But if any irregularity existed, it was waived by the defendant. (*Clafin v. Farmers' and Citizens' Bank*, 25 N. Y., 296; *Blodget v. Conkling*, 9 How., 442; *Denton v. Noyes*, 6 John., 296; *Am. In. Co. v. Oakley*, 9 Paige; *Bogardus v. Livingston*, 7 Abb., 428.) The direction as to the costs of judgment is directory. (*Stewart v. Slater*, 6 Duer, 83; *Lewis v. Jones*, 13 Abbott, 427.)

BOARDMAN, J.:

Upon a reading of the great mass of evidence, upon which this order appealed from was granted, certain facts appear to be well established, and need to be stated for a safe disposition of the various points raised.

On the 9th September, 1871, defendant James bought of plaintiff, the White hotel property at Saratoga Springs, at the price of \$51,000, paying down but \$500 cash and giving a bond and mortgage for the balance of the purchase money (less a small lien assumed), \$49,355, interest thereon being payable semi-annually, and the first payment of principal, \$6,500, to become due September 9, 1874; and by which mortgage it was further provided that if interest due should remain unpaid for twenty days, the whole principal should become due at plaintiff's option. As this security was not adequate, defendant James gave his bond to improve such property by the expenditure of \$12,000 thereon within eight months from the date of the deed, and, upon failure, to forfeit and pay, as liquidated damages, \$10,000; the same to be applied upon the bond and mortgage. Nothing was ever done in performance of this condition or agreement.

Immediately after such purchase, one Gaffney was appointed the defendant's agent to manage said property (defendant living in New York city), to collect rents, etc. The plaintiff was never

such agent, except to collect a small amount of rents, to reimburse him for moneys paid for insurance and taxes on property.

On the 9th of March, 1872, the semi-annual interest due on said bond and mortgage, was not paid to plaintiff, but only a part thereof, between \$400 and \$500; nor was the same paid within the twenty days thereafter. On the 8th of May, 1872, an action for the foreclosure of said mortgage was begun by the plaintiff, and the summons served on defendant James, and possibly on defendant Amelia, the wife of James. Defendant James put in an answer, setting up payment of interest on the ninth of March. Defendant Amelia did not appear, although James had the summons alleged to have been served upon her, and talked about her ability to answer. Coulter tried to stop the foreclosure suit by offers to turn out securities, but the parties were unable to agree upon terms, and Coulter, by his language, indicated an intention to abandon the property and let plaintiff get what he could.

On the 9th of July, 1872, the action was brought to trial, upon due notice to defendant's attorney; notice by mail and telegraph having been given to Coulter, and probably received by him. By consent of defendant's attorney (Coulter not appearing), the case was tried by Mr. Justice JAMES, at the town hall in Saratoga Springs. Defendant's attorney appeared on such trial and cross-examined plaintiff, who was sworn as a witness on his own behalf. Evidence was also given as to the condition of the property, and the possibility of its being sold in parcels. On the 12th of July, 1872, a decree, assented to by defendant's attorney, was signed by the judge, the costs having been allowed by defendant's attorney, except the extra allowance which was made by the court. The judgment was entered on that day with the knowledge of the defendant's attorney and without his dissent. John Foley, an attorney occupying the same office with plaintiff's attorney, but in no way connected with him in business, was appointed a referee to sell, with the assent of defendant's attorney.

On the seventh of September, the premises were sold at public auction, and purchased by plaintiff, for the sum of \$35,000. Notice of such sale was also sent to defendant, but he did not appear except by his attorney. On the same day, the report of the referee was made and confirmed at a Special Term, at the town hall, Sara-

toga Springs, before Mr. Justice BOOKES, the order reciting that E. H. Peters appeared and consented, as counsel for the defendant, and which is confirmed by the memory of Judge BOOKES, impressed upon him for reasons given. The report of sale was filed, and judgment against defendant, James, for the deficiency, \$18,911.94, was entered September 10, 1872. On the sixteenth, an execution for such deficiency was issued and delivered to the sheriff of Saratoga, in the usual form, except that on the inside of same, it was directed, "To the sheriff of the county of county." On the outside, under the title of the action, were the words, "Execution to Saratoga county," with directions to levy, etc., signed by plaintiff's attorney. By virtue of this execution, sums, in all amounting to \$2,000, were collected from rents due defendant from other property. Other executions were issued to the city of New York. On the 1st of October, 1872, defendant, James, was examined on supplemental proceedings in the city of New York, and about October-18, 1872, an action, in the nature of a creditor's bill, was begun against defendants, to reach the property of defendant, James, the defendants appearing and answering separately, about November 1, 1872, admitting the judgment.

After the sale, plaintiff, to the knowledge of defendant James, put improvements on the property of the value of \$15,000, or over, and in January, 1873, contracted to sell the property to Charles S. Lester, for \$69,000, and give a warranty deed. The value of the property, on the seventh of September, upon a forced sale, was not over \$40,000, but has since much increased, from other causes besides the improvements put thereon by plaintiff and others. Plaintiff has received from Lester, upon his contract of sale, \$16,000, and the purchaser or his assigns have expended some considerable money, in improvements upon the property. Before the recovery of the judgment for the deficiency, Coulter disposed of a large amount of property, so that it could not be reached by an execution, and has at no time offered to give security for the debt, if the judgment shall be opened.

On the 18th of March, 1873, and more than six months after the sale under the foreclosure, and judgment for the deficiency, the first motion papers are made out and served. It is apparent, from all the papers presented on this appeal, that the defend-

ant had no defense to this action; that Mr. Coulter knew it, and that he never hoped or expected to succeed in the defense. In the language of A. P. Smith & Co., June 15, 1872, he was seeing if this action could not be "staved off or beaten." After failing in efforts to arrange the matter and stop the foreclosure, he concludes that plaintiff may "take the property and go to hell with it, and if plaintiff got anything out of him, he would be lucky." In accordance with this determination, Mr. Coulter disposes of a large amount of property, and puts himself in a position to defy, as far as possible, any judgment for deficiency that may be rendered against him. Had one tithe of the energy and industry, bestowed by Mr. Coulter in the search for, and exposure of, irregularities and technicalities, been exercised by him in attention to his defense, or in the protection of his interests upon the sale, no necessity for his present motion would have existed. If Coulter did not know in advance when the trial was to take place; if he did not learn of the trial and judgment within a few days thereafter; if he did not know, in advance, of the time and place of sale; if he did not know of the judgment for the deficiency in a few days after its entry; then appearances are very deceitful. It may be, as Mr. Coulter swears, that such indications are false, but if so, he must have taken special pains to prevent communications reaching him.

Upon such conclusions as to the facts, the defendant is not entitled to have the judgment set aside and an amended answer served, as a favor, for the simple reason that he does not show any defense or any merits. He does not show that the judgment rendered, is unjust, or that the new answer proposed, can be sustained by proof, or justified by the law. As before said, the judgment is right, and the allegations of the amended answer are not true. The weight of evidence in the appeal papers, sustains both these assertions.

Nor is any satisfactory reason given why the sale should be set aside. Perhaps it is sufficient to say that the order, being in the discretion of the court below, is not appealable, in the absence of abuse of such discretion, of which there is no pretense.* But the sale should be sustained upon the merits. Enough appears to convince the mind that Mr. Coulter's absence from the sale was volun-

* 28 Barb., 480; 8 N. Y., 384; 28 Id., 160.

tary and intentional. His neglect, for over six months thereafter, during which time he was pursued by supplemental proceedings and creditors' actions under this judgment for deficiency, is sufficient evidence that the sale was not objectionable in itself, but only by reason of the consequences. But there is no evidence that the property brought an inadequate price, or that it would have brought a greater price, had all the persons who have sworn to its value been present. Even Mr. Coulter does not offer to bid more upon a resale, after \$15,000 to \$20,000 of improvements have been put thereon, and other circumstances have added to the value of the property. While the property may have been worth, on the day of sale, \$50,000 at private sale on long credit, it would be unreasonable to suppose that it would bring that sum in cash, at a forced sale. Such is not human experience. The very sale, made by plaintiff to defendant, is evidence of an extreme price, and a fair conclusion from the affidavits produced, would not carry the market value above \$40,000 on the day of sale. There was, therefore, no such inadequacy of price, as should lead to a resale by the order of the court. This is the more evident, since no indemnity for expenses of sale or improvements made is offered, nor is there any guaranty that more than \$35,000 will be bid upon a resale. The defendant knew that plaintiff would not bid above \$35,000. It is not pretended there is any fraud, misconduct or surprise that should invalidate the sale. Under such a state of facts, a resale should not be granted.*

Nothing remains but to examine the various irregularities and defects alleged, and see whether any of them are of a character to avoid the judgment or sale, or to render it proper, in the furtherance of justice, to interfere therewith by setting the same aside, and ordering a resale.

1. The trial at the town hall in Saratoga Springs, before Mr. Justice JAMES, was with the consent of defendant's attorney, who participated in it without objection. A Special Term was then and there held, by regular appointment of the judges. The case was regularly noticed for trial at that term. The jurisdiction of the

* *Whitbeck v. Rowe*, 25 How., 408; *McCotter v. Jay*, 80 N. Y., 80; *Lefferts v. Laraway*, 22 Barb., 167; *Duncan v. Todd*, 2 Paige, 99; *Amer Ins Co v. Oakley*, 9 id.

persons and of the subject-matter, was complete, and if there was any irregularity as to place where the trial was had, it was cured by the appearance and consent of defendant's attorney.*

2. The affidavit of filing of notice of pendency of action was defective.† But proper notice was, in fact, duly filed, and no objection was made to the sufficiency of proof of that fact by defendant's attorney. The court could allow such proof to be made and filed *nunc pro tunc*. It does not in any event render the judgment void, but is a mere irregularity,‡ and might well be disregarded or amended under the Code, sections 173, 176, in the absence of any wrong or injury to defendant.

But a further reason why this objection should not avail, arises from the nature and the object of the notice and the filing. It is made by statute, constructive notice to persons who claim under the defendant in the action, but are not parties to it. As their rights only are or can be affected, it is reasonable that they only should be heard to take advantage of its omission,§ and no such persons appear in this action.

3. The nomination by one party of a referee, the approval by the opposite party, and thereupon, his appointment by the court, is no violation of the rules of law,|| and no irregularity. Foley was not a clerk of plaintiff's attorney, nor ineligible.

4. The assent of defendant's attorney to the form of the decree, is an answer to the claim that the premises should have been sold in parcels. But this objection was waived upon the argument.

5. The motion for leave to serve an amended answer has already been considered.

7. The entering of the judgment, within the four days after the decision, was, if an irregularity, waived by defendants, in consenting to the entry, and allowing confirmations of sale. Besides, I am of the opinion that the requirement is so far directory, only, as that a neglect of its provisions will not be considered in the absence of wrong or injury to the defendant.¶ There is no evidence that this premature entry of judgment has deprived the defendant of

* Code, § 179.

† Rule 72.

‡ Potter v. Rowland, 8 N. Y., 448; Curtis v. Hitchcock, 10 Paige, 899.

§ 8 N. Y., and 10 Paige, *ante*.

|| Rule 73.

¶ Lewis v. Jones, 18 Abb., 427; Stewart v. Slater, 6 Duer, 83.

any right, or prevented any action he would otherwise have taken.

The 8th objection was waived upon the argument.

Obj. This has been considered under the seventh objection.

The 10th and 11th objections relate to the entry of judgment for deficiency, and to the issuing of execution on such judgment, within eight days after filing report of sale. These points are not now specially urged.

The 12th objection relates to defects in the execution. Enough appears to show its direction to the sheriff of Saratoga county, by the indorsement.

The only remaining objection touches the alleged want of service of summons upon Mrs. Coulter. We will assume that it was not served, for this discussion. As against the plaintiff, who was mortgagee, and those claiming under him, Mrs. Coulter had no claim against this property, because the mortgage was given for purchase-money. She had only an inchoate right of dower in the surplus realized after sale under the mortgage, which could only ripen into an absolute right upon the death of the husband, leaving her surviving. She therefore had no existing claim, at the date of this foreclosure, and no separate estate in the property, but only a possibility.* Service upon the husband would bind the entire title, except such possibility. For that reason, perhaps, it has been held in *Foot v. Lathrop*,† *Eckerson v. Vollmer*, ‡ *Lathrop v. Heacock*,§ and in the unreported case of *Hendrickson v. Hendrickson*, in this department, that a service upon the husband only, is good as to the wife, and the husband is bound to appear for her, or the default of the wife may be taken as if personally served.

The cases cited by defendant's counsel are not in point.] All of them are cases where relief was sought against the persons not served, and a personal judgment was rendered against them. But if such personal service upon the husband did not bind the wife and operate as a service upon her also, the most that can be said is, that her rights are not foreclosed.¶ And if she shall survive

* *Mills v. Van Voorhies*, 20 N. Y., 412.

† 11 How., 42.

‡ 53 Barb., 183; affirmed in 41 N. Y., 358.

§ 4 Lans., 1.

¶ 1 Daly, 440; 16 How., 150; 6 Abb., 307; 16 Abb., 353.

¶ *Mills v. Van Voorhies*, 20 N. Y., 412.)

her husband, whereby her inchoate right of dower would ripen into an absolute right of dower in the equity of redemption, she may then take her proceedings, and a judgment of foreclosure, to which she was not a party, will not bar her rights.

A laborious examination of the appeal papers, has satisfied this court that the learned judge who decided this motion at Special Term, has fully appreciated the merits and faithfully discharged his duty, in declining to grant defendant's motions, or any part thereof.

The order of the Special Term is therefore affirmed, with ten dollars costs of appeal.

Present—MILLER, P. J., and BOARDMAN, J.

Order affirmed, with costs.

EDWIN A. MENEELY AND GEORGE R. MENEELY,
RESPONDENTS, v. CLINTON H. MENEELY AND GEORGE
H. KIMBERLY, APPELLANTS.

Trade-mark—name—right to the use of—Injunction to prevent use of family name—denied except in case of fraud or deceit—Distinction between bequest of good will of business and exclusive use of name.

In 1826, Andrew Meneely, the father of the plaintiffs, and the defendant Meneely, commenced the business of bell making at West Troy, and continued therein until 1851, when the plaintiff, E. A. Meneely, became his partner, and so continued until his father's death in October, 1851, after which, the business was carried on by the plaintiffs. By reason of the skill of A. Meneely and his successors, the bell foundry had acquired a great reputation, the business having been carried on under the names of "Andrew Meneely," "Andrew Meneely & Son," "Andrew Meneely's Sons," and "E. A. & G. R. Meneely." In 1872, the defendants commenced bell making at Troy, under the name of "Meneely & Kimberly," and issued catalogues, resembling in most, but not in all respects, those issued by the plaintiffs. The defendants, by the use of the name "Meneely," expected and intended to derive a profit and advantage from the good reputation and celebrity in bell founding, given to that name by A. Meneely and the plaintiffs and the use thereof by them is calculated to do so, and does mislead persons not personally acquainted with plaintiffs and defendants, and with the respective locations of Troy and West Troy, and is injurious to the plaintiffs' business. *Held,*

that the plaintiffs were not entitled to an injunction restraining the defendants from using the name "Meneely" in the business of bell founding at Troy.

Under such circumstances, a court of equity will not interfere to prevent the use of a family name, in the pursuit of a lawful business, except where there has been fraud or deceit practiced, or where some false or fraudulent device has been employed to injure and interfere with the business of another, and impose upon the public.

The cases upon this subject examined and distinguished.

Andrew Meneely, by his will, after making certain specific legacies, devised all the remainder of his estate, both real and personal, to the plaintiffs, charging them with the support and maintenance of his children during the minority of the youngest of them, and with the payment of certain legacies, and he states that in so doing, he has taken into view "that I leave them * * * * * conveniences for carrying on a successful business; * * * * * and the good-will and custom which it is believed is established and connected with it." *Held*, (1), that there is a distinction between appropriating the good-will of a business of a deceased father, carried on in a particular locality, and enjoying the benefit of his name and reputation as a man of skill and fair dealing; (2), that there was nothing in the language of the will, which conferred upon the plaintiffs the exclusive use of the name of Meneely in the business of bell founding.

APPEAL from a judgment in favor of the plaintiffs, entered upon the report of a referee.

In 1826, Andrew Meneely, the father of the plaintiffs and of the defendant, Meneely, commenced the business of bell making, at West Troy, and continued to carry on the business until 1851, when the plaintiff, Edwin A. Meneely, became his partner, and the firm continued, as thus composed, until the death of the father in October, 1851, after which the business was carried on by the plaintiffs. Andrew Meneely left a will, by which, after making certain specific bequests, he devised all the remainder of his estate, both real and personal, to the plaintiffs, charging them with the payment of all his debts, and with the support of his children, until the youngest of them living should attain the age of twenty-one years, and with the payment of certain legacies to his children and wife. In the first clause of his will, he states that, in making this distribution of his estate and charging the plaintiffs with the payment of these legacies, he has taken into view "that I leave them in control of an ample capital, and with real estate constituting ample grounds, and also implements and conveniences for continuing and carrying on a successful business, which I have been favored in establishing by many years of toil and industry, and the good

will or custom which, it is believed, is established and connected with it, out of which business, if prosecuted by them with prudence and economy, which I have reason to believe they will use, I hope and confidently expect they will, they will have ample means to meet the payments I have charged upon them."

The plaintiffs complied fully with the conditions contained in the will. In the father's lifetime, and up to the time when Edwin became a partner, the firm style was "Andrew Meneely," but on Edwin's becoming a partner, it was changed to "Andrew Meneely & Son." After the father's death, the firm name was again changed to "Andrew Meneely's Sons," and, in 1863, to "E. A. & G. R. Meneely," the present name. In 1871, the defendant, Clinton H. Meneely, one of the children named in the will, associated himself with the defendant, Kimberly, and began the business of manufacturing bells, under the name of "Meneely & Kimberly," at Troy.

This action was brought to restrain the defendants from the use of the name of "Meneely" in the business of bell founding at Troy.

The referee, before whom the action was tried, found that the defendants, by the use of the name of "Meneely" in the establishment of their bell foundry at Troy, and in manufacturing and selling bells at Troy, under the name of "Meneely & Kimberly," expected and intended to derive a profit and advantage by reason of the good reputation and celebrity in bell founding, given to that name throughout the country, by the said Andrew Meneely and the plaintiffs, and that the use of the name of "Meneely" by the defendant, is calculated to, and does, mislead persons who are not personally acquainted with the plaintiffs and defendants, nor with the respective locations of Troy and West Troy, and the difference between these places, into the belief that the defendants are the proprietors of the "Meneely Bell Foundry," carried on by the plaintiffs; and such use of the name, Meneely, is injurious to the plaintiffs' business.

The referee decided in favor of the plaintiffs, and directed that an injunction should issue, restraining the defendants from using the name and designation, "Meneely," in the business of bell founding at Troy.

Irving Browne, for the appellants Courts have no power to restrain a man from honestly using his own name in his own business. (*Amoskeag Manuf. Co. v. Spear*, 2 Sand., 607; *Clark v. Clark*, 25 Barb., 79; *Howe v. Howe Machine Co.*, 50 Barb., 236; *Faber v. Faber*, 49 Barb., 357; *James v. James*, L. R., 13 Eq. Cas., 421; *Brown's Trade-marks*, pp. 402, 143.)

Edgar L. Fursman, for the respondents, cited, as to the right to the use of the name Meneely, *Fetridge v. Wells* (13 How., 385); *Stokes v. Landgraff* (17 Barb., 608); *Howard v. Menee* (1 How., App. Cases, 558); *Congress and Emp. Spring Co. v. High Rock Cong. Spring Co.* (57 Barb., 526); S. C. (10 Abb. [N. S.], 348); *Newman v. Alvord* (51 N. Y., 189); *Howard v. Henriques* (3 Sand. S. C. R., 725); *Churton v. Douglass* (1 H. R. V. Johns., 176); *Stone v. Carlan* (3 Mod. Law R., 361); *Davis v. Kendall* (2 R. I., 566); *Ainsworth v. Walmsley* (44 L. J. R. [N. S.], 352); *Perry v. Truett* (6 Beavan, 66); *Holmes v. Holmes* (37 Conn., 278); *Scheitzer v. Adkins* (46 L. J. R., 37 [N. S.], 847; Laws of 1863, chap. 209).

A brief, on behalf of the respondents, was also filed by *Hon. John H. Reynolds*.

MILLER, P. J.:

The plaintiffs claim that the use of the defendants' firm name of "Meneely & Kimberly," in conducting their business of bell founding in the city of Troy, is an infringement upon the plaintiffs' right to use the name of "Meneely," as a trade-mark in their business at West Troy, which was established by the father of the plaintiffs, and of the defendant "Meneely," and the plaintiffs themselves in the same business, and has become a trade-mark of great celebrity and value. The law favors the protection to manufacturers, of any trade-mark, name or symbol, which distinguishes their goods from others, so far as the ownership is concerned, and will interpose its strong arm to restrain those who attempt to appropriate this species of property by fraud or improper practices, to the detriment and injury of those who have acquired a right to the same.

In the case at bar, the defendants have not used the firm name

of the plaintiffs, or any name by which it has been heretofore known or designated, but the name of "Meneely & Kimberly," as constituting a copartnership while engaged in the same business as the plaintiffs have, for a long period of time, carried on. The objection is to the employment of the name of "Meneely" in connection with the same business as the plaintiffs, at the place where the defendants are located, which is the city of Troy, on the opposite side of the Hudson river from where the plaintiffs are situated.

Although the complaint alleges that the defendants established a bell foundry with the intention to injure the plaintiffs, and to deceive the public, the referee does not find any such intent, or that the defendants were guilty of any fraud, dishonesty or deceit. It is true, he finds that the defendants expected and intended to derive profit and advantage from the use of the name employed, and that the name of "Meneely" was calculated to, and did mislead persons, not personally acquainted with the parties or the several localities, and is injurious to the plaintiffs' business of bell making, but no intentional wrong is attributed to the defendants. As there was no bad intent found as a matter of fact, the use of the name must, necessarily, have been innocent.*

The question then arises, whether the defendants are liable to be enjoined without having done any wrongful act, and merely because they assumed to use the name of one of them in connection with a business, in which the ancestor of that defendant and of the plaintiffs had been engaged, and which, by a life of industry and toil, and by skill, he had made profitable, and an invaluable inheritance for his posterity. The right to the enjoyment of a good name, personally, or in connection with a business established by the labor and integrity of an ancestor, is an inestimable privilege, which cannot be too highly prized. As a general rule, every individual is entitled to the full benefits and advantages which such a privilege confers, and should not be deprived of the same by the interference of the courts, except in extraordinary cases, and for the most cogent of reasons. Nor does there appear to be any justice or equality in allowing some members of a family, whose paternal name and business reputation

* *Corwin v. Daly*, 7 Bosw., 233.

has been transmitted to them, to enjoy an entire monopoly of its fruits, to the exclusion of others. The defendant, Clinton H. Meneely, claimed the right to profit from the name which he inherited, and the good reputation which his father had earned in the business of bell founding. He was open and above board in declaring his intention thus to derive advantage, and formed a copartnership and conducted his business with the expectation and belief that profit would accrue to him, by reason of the good name and celebrity which had attended his father's successful career. I am inclined to think that, in this respect, he committed no wrong, and that he had a perfect right to use his own name in his own business, even although that name was the same as the one used by the plaintiffs, and the business precisely of the same character. It would, it seems to me, be extremely inequitable to allow some members of a family to deprive others of the rights acquired by a common inheritance, and to say that the family name should not be employed by one, because it might interfere with others—in other words, to deprive a man of the right to earn a livelihood in the name of his father, and in the pursuit of the only business which that father had been engaged in, or the son had been instructed to follow. The law does not sanction any such injustice, and, so far as I have been able to discover, none of the reported cases go to the extent of holding that a court of equity will interfere to prevent the use of a family name in the pursuit of a lawful business, under circumstances similar to those which are presented in the case at bar.

In most of the cases, and I am inclined to think there is no exception to this rule, the power of the court has only been interposed where there has been fraud or deceit practiced, or where some false or fraudulent device has been employed to injure and interfere with the business of another, and to impose upon the public. A brief reference to some of the leading cases which are relied upon, will, I think, sustain this view. In *Sykes v. Sykes*,* the action was to restrain the defendant from the use of the words, "Sykes' Patent," in the manufacture of powder flasks. The declaration alleged fraud and deceit. The plaintiff had a patent which had been adjudged invalid, on account of a defect in the specifica-

* 3 B. & C., 541.

tions, but the plaintiff afterward continued to use the same mark on his manufactured articles. The defendants imitated his, plaintiff's, stamp, and the goods were sold by retailers as articles manufactured by plaintiff. A verdict for the plaintiff was sustained upon the ground that the substance of the declaration was proved, and that the goods were sold for the express purpose of being resold as goods of the plaintiff's manufacture. The case was not analogous to the one at bar, for it showed the entire appropriation, verbatim, of a trade-mark, and was decided upon the ground that there was fraud. In *Oroft v. Day*,* the defendant, Day, having obtained the consent of one Martin, to use his name, set up the trade of a blacking manufactory, with labels having a general resemblance to those of the original firm of Day & Martin, whom the plaintiff represented. The defendant was a nephew of Day, one of the members of the old firm, who was deceased. And the Master of the Rolls held that, while the defendant had a right to the use of his name, he had no right to use it at the expense of Day's estate, or in such a way as to deceive and defraud the public, and to obtain for himself, at their expense, an undue and improper advantage. The fraud in this case was quite manifest, not only in using the name of Martin, who was not a member of the firm, and the imitation of labels of the old firm, but in substituting Holborn Hill for High Holborn, both meaning the same street, as the place of business of Day. In *Holloway v. Holloway*,† the plaintiff sold a medicine as the "Holloway's Pills," and the defendant, his brother, Henry Holloway, commenced selling pills as "H. Holloway's Pills," in boxes similar to the plaintiff's, with a view of passing off his pills as plaintiff's. It appeared that the defendant had given the printer copies of plaintiff's directions, papers, etc., with the design of imitating them, and the decision was placed upon the ground that the defendant intended to deceive the public, and make them believe that he was selling the plaintiff's pills. In *Burgess v. Burgess*,‡ an injunction was refused as to the use of the name of an article, and the doctrine is laid down, that where two persons have the same name, it does not follow, because the defendant sells goods under his own name, and the

* 7 Beav., 84.

† 18 Beav., 200.

‡ 17 Eng. Law & Eq., 257.

plaintiff has the same name, that he is selling them as the goods of the plaintiff.

Without examining particularly all the English cases, I think it may be said that in none of them, is a party restrained from the use of his own name, unless that party is brought within the rule already laid down.* The same remarks will apply to the American cases. And the right to use the name of a person, although it was the same as another, has been upheld. In *Clark v. Clark*,† a party was restrained from using the same trade-mark as another, but it was said that two persons of nearly the same name being engaged in the same business, each had the undoubted right to use his own name, and to describe the article which he sells by his well-known name. In *Faber v. Faber*,‡ an injunction was dissolved restraining the defendant from using his own name, although it was the same as the plaintiff's. And it was said by SUTHERLAND, J., "that it is easy to see that this circumstance may be an injury to the plaintiff, but the defendant, Faber, has a right to use his own name." * * * "*And any injury which the plaintiff has suffered or may suffer by such use of the defendant Faber's name, merely, must be viewed as an injury without a remedy.*" In *Howe v. The Howe Machine Company*,§ an injunction was dissolved restraining the defendant from the use of the plaintiff's name. It was said by one of the judges, that the surname could not be used in such a way as to deceive the public, and deprive the plaintiff of the benefit of the notoriety which his machines had gained; and another concurred upon the ground that there was no fraud upon the plaintiff in the use of the name. In *Stonebraker v. Stonebraker*,|| the evidence of an intent to deceive was manifest, and the defendants were enjoined from manufacturing or imitating the plaintiff's medicines, and from counterfeiting his labels, marks, etc., but no restraint was put upon the use of Stonebraker's name. In *Holmes v. Holmes*,¶ there was also a question of fraud, as well as an element of a contract or an estoppel.

* See *Rodgers v. Nowill*, 5 Man., Gr. & Scott, 109; *Taylor v. Taylor*, 23 Eng. L. & Eq., 281; *Perry v. Truefitt*, 6 Beav., 66; *Scheitzer v. Atkins*, 46 E. L. J. R. (37 N. S.), 847.

† 25 Barb., 77.

‡ 49 Barb., 357.

§ 50 Barb., 236.

|| 33 Maryland, 252.

¶ 37 Conn., 278.

While there are cases where the appropriation of a trade-mark which misleads the public, will demand the granting of an injunction, * I am not prepared to assent to the doctrine that fraud or a wrongful intent is to be presumed from the mere fact of using one's own name, which is the same as that of another, or that a person cannot do so where there is even a tendency to injure another, or to impose upon the public. The true rule is well stated in *Wolfe v. Burke*, † by GILBERT, J., who remarks: "A man cannot make a trade-mark of his name to the exclusion of a like use of it by another who bears the same name, if the use by the latter is fair and unaccompanied by any contrivance to deceive." Brown on Trade-marks, at page 143, lays down the following doctrine: "The rule is, that a man cannot turn his name into a trade-mark. Any other rule would lead to the most absurd consequences. There are several dicta the other way; but this must be attributed to a loose habit of speech or a want of acquaintance with the indispensable requisites of the technical mark." See, also, pages 246 and 314, and pages 329, 402, 403, where numerous cases are cited which sustain this position.

In the cases cited, the degree of similarity and the imitations were far more apparent and distinct than in the case at bar, and it is worthy of observation and especial attention, that here the defendants only employed the surname of one of them, which one alone is of the same character as the plaintiffs', or bears any similarity to their name or any of the various cognomens, some forty in all, by which they have been designated by their numerous business correspondents. It would be a far-reaching extension of the powers of a court of equity, to grant an injunction which would protect the plaintiffs in the use of all the different names, by which they have been in the habit of being addressed by their customers. There is no adjudged case, which has protected trade-marks to such an extent, or ever struck out the name of a single member of a firm, because it was similar to another engaged in the same business. The partnership name here, was "Meneely & Kimberly," and the plaintiffs' firm name, "E. A. & G. R. Meneely." And there is no such resemblance as would of itself either tend to deceive the public, or indicate a fraudulent purpose. The name of "Meneely"

* *Amoskeag Man. Co. v. Spear*, 2 Sand., 599.

† 7 Lans., 151, 156.

could not have been used with apparently less design to commit a fraud, unless Kimberly's name was placed ahead of it, which I think was not required.

The location of the defendants' business at Troy, was not of itself evidence of an attempt to deceive the public, or an interference with plaintiffs' rights. It was in a different city and county, across a river and some distance from plaintiffs, and the center of a manufacturing business of various kinds, where there was a market for this kind of manufactured property, and where, at least, one other bell foundry was in existence. If the defendants had no right to locate at Troy, then it would be difficult to prescribe the limits within which they could establish a business. If distance is to be considered, then they might be driven not only from the immediate vicinity of the plaintiffs, but beyond the limits where the name of Meneely was known or had acquired a reputation. The referee has found that the catalogues issued by the defendants, in the order in which it treats of bell founding and other matters, is in most, if not all respects like the plaintiffs' catalogues, and the illustrations, in most instances, resemble, but in some instances are strikingly different, and that the language is different. The similarity is certainly not very marked, and not so distinct as to make it appear that there was an intention to appropriate the plaintiffs' work for the benefit of the defendants. In presenting a subject of this character and a business of the same nature, it is not difficult to see that there must necessarily be strong resemblances in many points, and hence it is not entirely clear that an infringement has been made upon the plaintiffs' rights in this respect. That the illustrations of bells are similar, is by no means strange, as they are very much alike in most of their leading features, and it is not claimed that the plaintiffs enjoyed an exclusive right to manufacture any of the various kinds of bells, of which illustrations are given, as against other persons engaged in the same kind of business. It would be impracticable to illustrate certain kinds of bells which are alike, without marked resemblances. Take for instance the great bell of Moscow, illustrations of which must necessarily be alike, in order to present an accurate representation of the same. The same remark will apply to most kinds of church, as well as other bells. But the plaintiffs claim nothing in their complaint on this account.

They do not allege any imitation of plaintiff's trade-mark, by impressing or making the same upon the defendant's bells, nor any imitation of the plaintiffs' catalogue, or ask relief for any such reason. In fact, a catalogue or advertisement cannot constitute a trade-mark.* The plaintiffs' counsel insists that Clinton H. Meneely, by the acceptance of the benefits and acquiescence in the terms of his father's will, is estopped in equity from appropriating the reputation founded on the *good-will* of his father's business, for his own benefit. There is quite a distinction between appropriating the good-will of the business of a deceased father, carried on at a particular locality, and enjoying the benefit of his name and reputation as a man of skill and fair dealing, in the business in which he was engaged; and there is, in my opinion, nothing in the language of the will, which confers upon the plaintiffs the exclusive use of the name of Meneely in the business of bell founding, or which precludes the defendant, Meneely, from engaging in the same kind of business in another locality. It should be a clear and explicit provision, which would preclude a child from the enjoyment of his father's name and fame, and from earning a livelihood within the limits where such reputation was known and acknowledged. No such condition is made in the will, by which Clinton H. Meneely surrendered any right which he had, by the acceptance of the bequests, made for his benefit; nor is any such intention manifested by the testator. The bequest to Clinton was unconditional, and without any restriction upon him. In fact, he was, at the time of his father's decease, an infant, and it does not appear that the provision, in his behalf was any more than an equal share of the large and valuable property, most of which he had given to the plaintiffs.

The intention, therefore, to confine the use of the testator's name to the plaintiffs, is not supported by evidence, and is not to be inferred from the facts and circumstances presented. Even if the testator had a right to confer the exclusive right to the use of his own individual name, it may well be doubted whether his proprietorship extended so far as to prevent his son from the fair and honest employment of his own name in the prosecution of a lawful business in the manufacture of bells. As long as no fraud or deceit was practiced, or false or fraudulent deceit resorted to, so as to

* Candee v. Dure, 54 Ill., 439.

directly interfere with the plaintiffs' business, or to deceive or defraud the public, the defendants were justified, and cannot be restrained by the interposition of a Court of Equity. The referee was clearly in error in his conclusion, and the judgment must be reversed and a new trial granted, with costs to abide the event.

Present—MILLER, P. J., BOOKES and BOARDMAN, JJ.

Judgment reversed and new trial ordered, costs to abide the event.

JOHN BRADY, RESPONDENT, v. THE RENSSELAER AND
SARATOGA R. R. CO., APPELLANT.

Negligence — Fences and cattle-guards — duty of railroad company to maintain.

A cow, owned by the plaintiff, was left in charge of a boy, who drove her from plaintiff's stable to an open lot, adjoining defendant's track, near a crossing, in the vicinity of which, some of the fences were temporarily and necessarily down, for the purpose of repairing the roadway of defendant; the boy having left the cow for a short time, she strayed upon the track and was killed by a passing train; *held*, that the defendant was liable.

Bowman v. The Troy and Boston R. R. Co. (87 Barb., 516), distinguished.

The defendant was bound to erect and maintain fences and construct and maintain cattle-guards at the crossing near which the cow was run over, and having failed to do so, was liable to the plaintiff for the damages sustained by him. The exceptions to this rule are, where it appears that the plaintiff drove his cattle on the road and left them there, or voluntarily permitted them to stray upon the track, or did some positive act increasing the danger.

APPEAL from a judgment, in favor of the plaintiff, entered upon a verdict of a jury, in an action brought and tried in the Albany County Court. The plaintiff, in July, 1872, owned a cow, which, on the day in question, was left in charge of a boy, who, in the afternoon, drove her from plaintiff's stable down to an open lot adjoining defendant's track, in the northern part of the city of Albany, near a crossing known as Holligan's. In the vicinity of this crossing, defendant's roadway was being improved and repaired, and some of the fences at the crossing were temporarily and necessarily down for that purpose. The boy left the cow for

a short time, and she strayed upon the track, either upon the crossing or south of it, just as a regular train arrived at this point, and was struck and killed, and the engine and cars were thrown from the track and injured. At the close of plaintiff's testimony, defendant moved for a nonsuit, on several grounds stated, and again renewed said motion at the close of defendant's testimony, but the motions were denied, and the defendant excepted. The jury found a verdict in favor of the plaintiff, for fifty dollars, and judgment having been duly entered, the defendant appealed.

George W. Miller, for the appellant and defendant.

Anson Bingham, for the respondent and plaintiff.

MILLER, P. J.:

In *Rowman v. The Troy and Boston Railroad Company*,* it was held, that, where one suffered his cow to be at large in a public street, and on the track of a railroad in a city, apparently alone and unattended, with no one to take charge of her, and where it did not appear that she was in the vicinity of the plaintiff's residence, or had been previously taken care of by him, or had escaped without his fault, or was lawfully traveling along the street, that he could not recover for injuries to the cow, happening through the negligence of the railroad company. This was an extreme case, and differs essentially from the case at bar, for here the cow was kept and fed in the plaintiff's stable, and only allowed to go out in charge of a boy employed for that purpose, and then, not very far from the plaintiff's residence. The plaintiff had taken every precaution to guard against danger or accident, and it was the absence of the boy, without the knowledge or consent of the plaintiff, which enabled the cow to stray upon the defendant's track, where she was killed. There is a class of cases which holds, that, where the defendant was in default, the negligence of the owner, in permitting the animal to run at large in the highway, or to trespass upon the premises of a neighbor, is not a defense.†

I am inclined to think that the judgment may be upheld within

* 37 Barb., 516.

† *Munch v. N. Y. C. R. R. Co.*, 29 Barb., 647; *Suydam v. Moore*, 8 Barb., 358.

the principle here laid down, and that the temporary absence of the boy in charge of the cow, was no defense. Even if it may properly be urged, that there was a question of plaintiff's negligence in the case, I am not prepared to say that it was not for the jury to determine, under all the circumstances, whether there was negligence. But, independent of these considerations, I think that the case may properly be disposed of upon another ground. The defendant was bound to erect and maintain fences, and to construct and maintain cattle-guards at their crossings, near which the cow was run over.* This had been done, but when the accident occurred, the fence was temporarily removed, for the purpose of repairing the track, and there was evidence to show that the cattle-guard, at the crossing, was defective and insufficient, so that cattle could walk over the same. The defendant was clearly liable within the principle laid down in *Corwin v. The N. Y. & E. R. R. Co.*,† by DENIO, J., that the design of the section was to require the railroad company to inclose their tracks with substantial fences, and to guard them by ditches, called cattle-guards, and that one method provided for securing that object, was the provision charging the companies which had disregarded the statute, with damages for all injuries done to animals, and that it was not material from whence, or under what circumstances, the animals came upon the track, provided they were enabled to get there by the absence of cattle-guards. As was said in *Bradley v. N. Y. & E. R. R. Co.*:‡ “It is no excuse that the cattle, horses, etc., were at large in violation of law.” The exceptions to this general rule are, where it appears that the plaintiff drove his cattle on the road and left them there, or did some positive act increasing the danger of his cattle, or in a case where a party voluntarily permits his cattle to stray upon the railroad track.§ As the case stood, there was no question of contributory negligence to submit to the jury, for even if the plaintiff had known of the defects of fence or cattle-guards, it would have been no defense.¶ The point is not distinctly taken, that the provision of the railroad act cited, does not apply to cities and villages, and for that reason the defendant was excused. But

* S. L. of 1854, 611, § 8.

† 18 N. Y., 49.

‡ 34 N. Y., 432.

§ *Corwin v. N. Y. & E. R. R. Co.*, *supra*; *Poler v. N. Y. C. R. R. Co.*, 16 N. Y., 490.¶ *Shepard v. B.*, N. Y. & E. R. R. Co., 35 N. Y., 644, 645.

if this can be urged, it is completely answered by saying that, in the cases which sustain this doctrine, it appeared that no fences or cattle-guards had been made, and that they could not be made without creating nuisances or interfering seriously with the owners of property in villages, while here, they were conceded to be necessary, and were actually made by the defendant. While the rule laid down might very properly apply to a populous city or village, or such portion of it as was built up, the reason of it would have no application to the outskirts of a city or village, where the land was open and not occupied with buildings. But the rule has been restricted and it is held, that the statute as to cattle-guards, at road crossings, applies as well to streets in villages as to country highways. * There was no error in any of the rulings upon the trial, and the judgment must be affirmed, with costs.

Present—MILLER, P. J., BOCKES and BOARDMAN, JJ.

Judgment affirmed, with costs.

GEORGE S. WOOD, PLAINTIFF IN ERROR, v. THE PEOPLE,
DEFENDANTS IN ERROR.

*Bill of exceptions—how and by whom settled—Indictment—motion to quash—
Perjury—conviction for—sustained when offense is sufficiently assigned in any
one count—Punishment for the crime—refusal of the judge to charge the jury as to.*

Plaintiff in error was convicted of perjury at a court of sessions, held on August 27th, 1872, and sentenced. On August 26, 1873, a bill of exceptions was settled by the county judge and justices of sessions of the county where the conviction was had, none of whom took part in the trial, or were, at the time thereof, members of the court. *Held*, that no bill of exceptions had been settled as required by law. The same court which tries a criminal must settle the bill of exceptions, and such settlement must take place before the final adjournment of the court, at which the trial is had.

After pleading not guilty to the indictment, the plaintiff in error moved to quash the indictment; the motion was denied and an exception taken. *Held*, that the motion was addressed to the discretion of the court, and was not a proper subject of exception.

* *Brace v. N. Y. C. R. R. Co.*, 27 N. Y., 269.

The indictment alleged that the court was held at the town of Kingsbury, and that the perjury was committed at the village of Sandy Hill. *Held*, that the indictment was sufficient, as it was alleged in each count that the court was held, and the perjury committed, in the county of Washington; that the precise locality is not matter of description, and need not be proved as alleged; *held*, further, that the courts take judicial cognizance of the statutes of the State, whereby counties, towns, etc., are created, and thus know that the village of Sandy Hill is in the town of Kingsbury.

In an indictment for perjury, the time stated therein when the oath was administered, is not material, so it be before the finding of the indictment and within the statute of limitations.

Where the offense is sufficiently assigned in any one count in the indictment, the remainder may be rejected as surplusage, and the conviction sustained.

The judge refused to instruct the jury as to the punishment of the prisoner, if convicted. *Held*, that this was correct; the jury had nothing to do with the punishment, nor had the degree thereof any possible right to influence their verdict.

A writ of error brings before the court only the record and exceptions taken, and it is not competent for it to weigh the evidence, or pass upon the correctness of the verdict of the jury.

WRIT of error to review the conviction of the plaintiff in error, for perjury, at a Court of Sessions, held in and for the county of Washington.

Plaintiff in error was convicted upon an indictment for perjury, at a Court of Sessions, held in and for the county of Washington, on the 27th day of August, 1872, before Hon. Charles S. Lester, county judge of Saratoga county, and Eli Skinner and William Hatton, justices of the peace of Washington county, designated, according to law, as members of the Court of Sessions. Upon such conviction, plaintiff in error was sentenced to imprisonment in the State prison for five years. Afterward, and on the 26th of August, 1873, exceptions were settled by Hon. A. D. Wait, county judge of Washington county, and John R. Little and John Norton, justices of sessions of said county, none of whom took part in the trial of said indictment, or were members of said court when the same was tried. Nor does it appear that said court, held in August, 1873, was a continuance or adjourned term of the court held in August, 1872.

Upon the trial, exceptions were taken to the rulings of the court, which, so far as necessary, are stated in the opinion. The writ of error was granted on the 20th day of January, 1874, and was

accompanied with a stay of proceedings, the plaintiff in error being, as is understood, on bail since his conviction.

J. S. Landon and C. F. Doyle, for the plaintiff in error.

R. C. Betts, district attorney, and *H. Smith*, for the defendants in error.

By the Court, BOARDMAN, J.:

The bill of exceptions presented to us is not such as the law requires. By the 2d Revised Statutes, 736, section 21, it is provided, that exceptions may be taken upon the trial of an indictment, by the defendant, to the decisions of the court, as in civil cases; but, by sections 23 and 24, such bill of exceptions shall not delay the execution of the judgment, unless a stay is indorsed upon such bill of exceptions after the same is settled and filed. In this case, no exceptions were settled, as required by law, by the court which tried the plaintiff in error, nor until a year after the trial. Three persons, who took no part in the trial, and were not members of the court where the trial was had, assumed to sign and settle the bill of exceptions. Such practice is wholly unwarrantable. The same court which tries a criminal must settle the bill of exceptions, and such settlement must take place before the final adjournment of the court, at which the trial is had.* The fact that provision is made for such settlement, when the judge who tried the case is dead or gone out of office,† indicates quite clearly that the judges who preside at the trial must settle the bill of exceptions, and that no other judges or officers can do so. It is self-evident, that such a rule is the only safe and prudent one.

If this conclusion be correct, there is no bill of exceptions in this case before this court, and its contents cannot be examined, as a basis of action upon this writ. All that the writ has brought up, is the judgment record. Such questions, only, as arise upon the face of the record, can be reviewed. Nearly all the objections, upon which the plaintiff in error relies, are such that, if real, they will appear upon the record, and may, therefore, be reviewed. After pleading not guilty to the indictment, the plaintiff in error moved

* *Hirge v. The People*, 5 Park. R., 9.

† *Laws of 1872*, chap. 56.

to quash it, for various reasons assigned, and an exception was taken to the denial of the motion. This exception cannot avail, because such motion is addressed to the discretion of the court, and is not a proper subject of exception.* The case is still stronger against the plaintiff in error, after arraignment and plea of not guilty.† But that is not of importance, since the same objections are presented by a motion in arrest of judgment, at the close of the case.

Let us examine the various questions presented, and see whether the indictment is sufficient to sustain the conviction. Because the court is alleged to have been held in the town of Kingsbury, and the perjury to have been committed in the village of Sandy Hill, it is claimed that the conviction cannot be maintained. It is sufficient, that each count in the indictment charges that the court was held, and the perjury committed, in the county of Washington. That is all that was essential to jurisdiction in this case. The precise locality in the county is not matter of description, and need not be proved as laid. The charge is transitory.‡

But courts take judicial cognizance of the statutes of the State, whereby counties, towns, cities and villages are created, and thus know that the village of Sandy Hill is in the town of Kingsbury.§

Another objection is, that the oath was administered March second and the perjury committed March third, and that the indictment is therein repugnant. The time stated in an indictment when the oath was administered, is not material, so it be before the finding of the indictment, and within the statute of limitations. There are certain exceptions, where time is of the essence of the offense, but this is not one of them.¶ The time so stated is immaterial and may be rejected.

Another objection is, that perjury is imperfectly assigned. A careful reading of this indictment, satisfies me that the assignment

* *People v. Eckford*, 7 Cow., 535; 1 Colby, 266.

† *People v. Walters*, 5 Park., 661; 1 Whar. Crim. Law, §§ 519, 520, 524.

‡ *Rex v. Woodward*, 1 Moody C. C., 323; 1 Whar. Am. Crim. Law, §§ 601, 602; 2 Colby Crim. L., 131.

§ *Vanderwerker v. People*, 5 Wend., 530; *Bronson v. Gleason*, 7 Barb., 475; *People v. Breesa*, 7 Cow., 429.

¶ *People v. Stocking*, 50 Barb, 573; 2 Colby C. L., 129; 1 Whar. C. L., §§ 261, etc.

of perjury is full and complete in some of the counts. In the first count, it is alleged that the evidence, therein stated to have been given, was material to the issue being tried; it gives the testimony of plaintiff in error on former trial, and then, specifically, and in detail, charges that it was false. If, however, in some instances, such assignments should be found defective and insufficient, it would not answer the plaintiff in error's purpose, so long as any one charge in the count is perfect upon the record.* The remainder may be rejected as surplusage.†

Whatever may be thought of the assignment of perjury in some of the counts, it is beyond doubt that the first count is good, under the above authorities; conceding that, a motion in arrest could not prevail, nor can a conviction be reversed. After a general verdict of guilty, as in this case, the conviction will be sustained, if there be one good count, though many others are defective.‡

It appears that, in 1869, Wood brought an action of slander against one Conant, alleging that Conant had charged him with killing a diseased cow, and selling diseased and unwholesome meat from said cow. Conant answered by general denial, and also justification. Upon the trial, Wood testified that the cow was never sick, to his knowledge, nor lame, nor had she any swelling, to his knowledge; that he had never told one George Chapin she had a swelling; that no part of the meat was cut off and thrown away; that the meat was not diseased; and that he ate a portion of said meat, etc., etc. All of this, and other evidence not here set forth, was, and is alleged to be, false, and for such alleged false swearing, this indictment was obtained. Upon a trial before a jury, Wood has been convicted. Notwithstanding it is believed the proceedings and evidence upon the trial are not properly before us for review, we will briefly allude to the objection raised in that respect. It is difficult to understand why all the testimony alleged to be false, was not material upon the issue above stated. Certainly, it all bore upon the possession, by Wood, of a diseased cow, his slaughtering her, his knowledge of her condition and the quality

* *Rex v. Hill*, Rus. & Ry., 199; 2 Wharton Cr. Law, § 2260; *People v. Haynes*, 11 Wend., 564; reversed in Court of Errors, but not on this point.

† 1 Salk., 384; *Reg. v. Rhodes*, 2 Ld. Ray., 886; *Douglas*, 703.

‡ *Guenther v. People*, 24 N. Y., 100.

of the meat, and was, therefore, competent evidence to repel the justification. If Wood's evidence was believed, in the action of slander, a justification of the words spoken, could not be sustained. Whatever evidence may have been given by Conant, tending to establish the truth of the words charged, it would be overcome by Wood's testimony, if credited. It must be apparent from the nature of the issue, upon the face of the record, that the evidence was material.

Another objection is the refusal of the court to instruct the jury, as to the punishment of Wood, if convicted. The refusal was correct. The jury had nothing to do with the punishment, nor had the degree of punishment* any possible right to influence their verdict. Such information would have been simply mischievous in its effect upon jurors, by creating sympathy or prejudice, in no respect aiding them in rendering a true verdict upon the evidence.*

In the view taken of Wood's evidence, no error was committed in allowing Woodcock to testify to the killing of the cow, and to finding a sore upon her which he cut off and threw away. It was essential to Conant to prove the cow, in Wood's possession, diseased, slaughtered in that condition, and diseased portions of the flesh thrown away. All these were circumstances, essential to be proved in justification. It may well be that other and more important facts must be established, but these were links in the chain, and were competent.

The decision of the court, in the admission of Brigham's evidence, as to the quality of the beef, was correct. The reason he gave for such decision is not excepted to, and is not covered by an exception to the admission of the testimony. The remark of the judge was not, apparently, addressed to the jury, and was not the object of an exception.

The writ of error brings before this court only the record and exceptions taken on the trial. It is not competent for the court to weigh the evidence, or pass upon the correctness of the verdict of the jury; questions of fact cannot be reviewed by writ of error. It is not analogous to appeals in civil cases. The evidence is only of use, in determining the value of the exceptions taken.†

* *Wilson v. People*, 4 Park., 633.

† *People v. Thompson*, 41 N. Y., 1.

For the reasons assigned, we think no fatal error was committed upon the trial of this indictment, and that the conviction and judgment should, in all things, be affirmed.

The proceedings and judgment are remitted to the Court of Sessions of Washington county, for such further action as may be proper; and the plaintiff in error will appear at the next Court of Sessions, to be held in and for Washington county, and abide the order and judgment of said court.

Present—MILLER, P. J., BOOKES and BOARDMAN, JJ.

Conviction and judgment affirmed.

DE WITT C. GIBSON, RESPONDENT, v. THE AMERICAN
MERCHANTS' UNION EXPRESS COMPANY, APPELLANT.

*Express company — Receipt — liability under — Loss — Negligence — proof of —
"C. O. D."*

Plaintiff delivered to defendant, at Fort Plain, N. Y., February 20, 1871, a box, marked "S. F. Dana, Malden, West Va., C. O. D., \$45," and his son and clerk drew up a receipt therefor, from blank receipts left by defendant with plaintiff, which was signed by the defendant and returned to plaintiff. By the terms of the receipt, defendant undertook to forward the box to the nearest point of destination reached by it, but was not to be liable for any loss, except as forwarder, nor for loss by fire, nor for any default or negligence of any company, to which the property might be delivered for transportation, off the route of defendant; and such company was to be regarded as the agent of the consignor. The defendant transported the box to Columbus, Ohio, the nearest point on its route to West Virginia, and delivered it to the Adams Express Company, by which it was transported to Malden and tendered to the consignee, who refused to receive it and pay charges. Subsequently, and on the second of March, the office of the company, and with it this box, was burned; *held*, that the defendants were not liable. The ordinary character of the shipment was not affected by the words, C. O. D., and the contract thereby expressed, until the collection should, in fact, be made.

After the tender and refusal of the consignee to accept the box, it was held by the company as a warehouseman, and the company could only be made liable by reason of its negligence, which cannot be presumed but must be proven; and as, in this case, there was no proof as to the cause of the fire, the defendant was not liable.

APPEAL from a judgment of the County Court of Montgomery county, affirming a judgment in favor of the plaintiff, in a Justice's Court.

On the 20th day of February, 1871, the plaintiff delivered to defendant, at Fort Plain, N. Y., a box containing a light double harness, worth forty-five dollars, marked, "S. F. Dana, Malden, West Va., C. O. D. \$45." From blank receipts, left by defendant with plaintiff, his son and clerk drew up a receipt for this box, which was signed by defendant's agent and returned to plaintiff. By the terms of that receipt, defendant undertook to forward the box to the nearest point of destination reached by defendant, but was not to be liable for any loss or damage, except as forwarder only, nor for loss by fire, nor for any default or negligence of any company, to which the property might be delivered for transportation, etc., off the route of defendant; nor was such other company to be deemed the defendant's agent, but, on the contrary, it was to be taken as plaintiff's agent, as to this property. The defendant took the box and transported it to Columbus, Ohio, the nearest point on its route to West Va.; and, at Columbus, on the 22d day of February, defendant delivered said box, in good order, to the Adams Express Company. By this last company, the box was transported to Malden, West Va. When it reached Malden, does not appear. The evidence tends to show that the package was tendered to S. F. Dana, the consignee, who refused to receive or pay the charges and collection thereon. When this was, does not appear. Upon the 2d day of March, 1871, the box still being in the possession of the Adams Express Company, at Malden, the express office was burned, and, with it, this box and its contents. The cause of the fire does not appear. After the burning of the box, the plaintiff, at Fort Plain, demanded the amount to be collected by defendant or a return of the property. Upon a failure to do either, this action was brought, and plaintiff recovered forty-five dollars damages. The judgment of the justice was affirmed by the County Court, and an appeal is now taken to this court.

J. Genter, for the appellant. The acceptance of the receipt constituted a valid, special agreement between the parties. (*Maghee v. Camden and Amboy Trans. Co.*, 45 N. Y., 514; *Bissell v. N. Y.*

C. R. R. Co., 25 N. Y., 442; *Meyer v. Harndens Ex. Co.*, 24 How., 29; *Westcott v. Fargo*, 6 Lans., 319; *Van Santvoord v. St. John*, 6 Hill, 157.) As to effect of the letters, C. O. D. (*Am. Mer. Union Ex. Co. v. Schrier*, 55 Ill., 140; *Weed v. Barney*, 45 N. Y., 344.) Negligence must be proved. (*Bush v. Miller*, 13 Barb., 481; *Schmidt v. Blood*, 9 Wend., 268; *Edwards on Railroads*, 285.)

J. D. and F. F. Wendell, for the respondent. The acceptance of the receipt did not establish a special contract. (*Railroad Co. v. Manufacturing Co.*, 16 Wallace, 318; 1 Redf. on Railroads, 302; *Blossom v. Dodd*, 43 N. Y., 264.) As to the effect of the mark, C. O. D. (*Tooker v. Gormer*, 2 Hilt., 71; *Palmer v. Holland*, 51 N. Y., 416; *Reed v. U. S. Ex. Co.*, 48 N. Y., 462; *Denning v. N. Y. C. R. R. Co.*, 13 Gray, 481; *Whitney v. Merchants' Union Ex. Co.*, 6 Am. R., 207.)

BOARDMAN, J.:

Upon the facts stated, it cannot be doubted that the plaintiff should be held in law to have known the contents of the receipt, made out by his clerk upon blanks for his daily use. Nor can it be doubted that a common carrier, in ordinary cases, would not be responsible, under such a receipt, for loss or damage to property, after its safe delivery to the next connecting carrier, according to the usual course of business.*

The letters, C. O. D., and the contract thereby expressed, do not, in my judgment, change this shipment from one of an ordinary character, until the collection shall in fact have been made. The duty to transport is precisely the same; and so of a tender of delivery. If the consignee neglects or refuses to take the property and pay the money, the property remains in the carrier's hands as a warehouseman, precisely as if no money besides express charges were to be collected. In either case, the carrier is responsible only for a loss caused by its negligence.† If this be true, the defendant was not liable for loss, after delivery to the Adams Express Company, under the facts in the case.

But in this case, it may well be doubted if the defendant would have been liable, had its route run to Malden, West Va., and the

**Reed v. U. S. Express Co.*, 48 N. Y., 462. †*Weed v. Barney*, 45 N. Y., 344

loss happened, as appears by this evidence, in defendant's own office at that point. It is not shown when the box arrived at Malden, or when it was tendered to the consignee and refused by him. After such refusal, it was the duty of the carrier to keep the property, as a warehouseman. But very soon thereafter, and before advice could have been obtained from the plaintiff, the office and box were burned. It may be claimed that the carrier was not bound to notify plaintiff, in the absence of contract or directions.* If the carrier became a warehouseman, by the refusal of the consignee to accept, he could only be made liable for his negligence. Negligence cannot be presumed, but must be proven, after the proof of destruction by fire, and after tender, as in this case.†

Now, it seems plain that the express company became a warehouseman, and, as there is no proof that the fire was caused by its negligence, it could not justly be held responsible.

Upon both grounds, I think the judgment of the County Court, and of the Justice's Court, should be reversed, with costs.

Present—MILLER, P. J., BOOKES and BOARDMAN, JJ.

Judgment reversed, with costs.

HARRIET BEAL, APPELLANT, v. JOHN C. MILLER,
RESPONDENT.

Tenants in common — Merger — Election.

Ejectment, to recover the equal, undivided one-half of certain real estate. May 1st, 1816, Vedder conveyed a piece of land in Amsterdam, including the premises in question, to G. W. Beal and Z. Cook, who executed to him a mortgage on the same premises, which he subsequently, and on the 10th of May, 1816, assigned to G. W. Beal, Z. Cook and Sarah Beal, the mother of G. W. Beal and mother-in-law of Cook. Cook took possession of the premises. September 15th, 1827, said Cook and wife, with the knowledge of G. W. Beal, conveyed to Sarah Beal a portion of said land, including the premises in question, in consideration of \$1,800, by deed, which was recorded September 28th, 1827. Sarah Beal died in January, 1828, leaving a last will and testament, duly executed, by which she devised to her son, W. H. Beal, "a piece of land in the town

* Weed v. Barney, 45 N. Y., 347, 348.

† Bush v. Miller, 13 Barb., 489; Schmidt v. Blood, 9 Wend., 263.

THIRD DEPARTMENT, MAY TERM, 1874.

of Amsterdam aforesaid, called the 'wheat lot,' lately in possession of Zebulon Cook, and contains about six acres," being the premises in question, and by a codicil thereto, she revoked this devise to her son, and gave the same estate, theretofore devised to him, to his daughter, Harriet Beal, the plaintiff herein. Harriet Beal, on May 12th, 1859, conveyed one undivided half part of the wheat lot to Marcellis and Winegar, who subsequently conveyed the same to the defendant. On the 28th of August, 1835, G. W. Beal conveyed the wheat lot to David B. Corey, by quitclaim deed, which was duly recorded. David B. Corey's title was subsequently acquired by the defendant. *Held*, (1.) That, by the assignment of the mortgage, the assignees thereof became tenants in common, each being entitled to the undivided one-third part of the same; that, as Z. Cook and G.W. Beal owned the equity of redemption, two-thirds of the mortgage immediately merged in the fee, and only the one-third owned by Sarah Beal remained effectual. (2.) That, by the conveyance of Cook to Sarah Beal, she acquired title to the undivided one-half part of the wheat lot; that one-half of her interest in the mortgage became merged, and she had a lien on the other half of the lot, for one-sixth of the amount of the mortgage only. (3.) That, by her will, Harriet Beal, the plaintiff, took only such title as the testatrix had; that, if she acquired any interest in the mortgage, the statute of limitations had run against it. (4.) That the plaintiff had no title to any portion of the lot.

Sarah Beal, by her will, bequeathed to G. W. Beal a writing desk, worth twenty-five dollars, which he accepted. *Held*, that this was not a case for the application of the doctrine of election, and that G. W. Beal was not required to give up his interest in the wheat lot, as it did not appear that it was the intention of the testatrix that he should do so, and that, even if it was, it would only give the plaintiff a right to proceed against him in equity, and would not affect a *bona fide* purchaser of the property, without notice of the latent equity.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

This action was brought to recover the one equal, undivided half part of a lot of land, situated in the village of Amsterdam, in the county of Montgomery. The case was tried before a referee. It appeared, upon the trial, that on the 1st day of May, 1816, one Harmanus Vedder was the owner of a lot of land, situated in the town above named, containing about thirty-four acres, of which the premises in controversy were a part, which he conveyed, by warranty deed, to George W. Beal and Zebulon Cook, and, on the same day, said Cook and Beal executed to said Vedder a mortgage on the premises, to secure the payment of the sum of \$3,500. On the 10th of May, 1816, said Vedder, by an instrument indorsed upon said mortgage, in consideration of the sum above named, assigned the said mortgage deed, and granted and sold his interest

in the premises described therein, to George W. Beal, Zebulon Cook and Sarah Beal. Cook took possession soon afterward, but the extent and duration of his possession are not shown. On the 15th day of September, 1827, said Cook and his wife, with the knowledge of George W. Beal, conveyed a portion of the premises described in the deed from Vedder, which included the premises in question, in consideration of \$1,300, to Sarah Beal, which deed was duly recorded on the 28th of September, 1827. Sarah Beal was the mother of George W. Beal, and mother-in-law of Cook, and died in January, 1828, having, prior to her decease, duly made her last will and testament and a codicil, which were duly proved after her decease; that a portion of the premises, included in the Cook deed to her, was a wheat lot of six acres, which six acres or wheat lot were given or devised by the said Sarah Beal, by her said will and the codicil thereto, in the words following: "I give and devise to my son, William Henry Beal, a piece of land in the town of Amsterdam aforesaid, near the village of Amsterdam, called the 'wheat lot' lately in the possession of Zebulon Cook, and contains about six acres, to have and to hold the same to him, the said William, his heirs and assigns, forever." And the said Sarah, by a codicil, annulled and revoked the said devise to her said son William, giving and devising, by the said codicil, the same estate and interest, which would have been to her said son William by the will, to his daughter Harriet Beal, the plaintiff in this action. At the time the will and codicil were admitted to probate, the plaintiff in this action was an infant, aged seven years, then living with William H. Beal, her father, who resided at Schenectady, about fifteen miles from Amsterdam, and continued to reside with her father until his death, in 1871. On the 12th day of May, 1859, said plaintiff sold and conveyed, by deed, duly executed and delivered, to Jeremiah V. Marcellis and Renben E. Winegar, one undivided one-half part or portion of the said premises, the wheat lot. The said deed was recorded in the clerk's office of Montgomery county, on the 14th day of May, 1859, and the said Marcellis and Winegar in the month of June, 1859, aforesaid, went into the possession of the said premises under the deed from plaintiff. There was some evidence, tending to show that this plaintiff exercised acts of ownership until the

deed was executed, in 1859, to Marcellis and Winegar, and that the grantees in the deed, or one of them, remained in possession until they transferred the premises, and the defendant acquired title to the same. There was a stone wall on three sides of the lot, and the river on the other side, soon after the deed from Vedder, but the wall along the highway, as early as 1830, was down, so as to offer no protection, and from 1830 to 1865, there was no substantial inclosure. By the will of Sarah Beal, she bequeathed her portable writing desk, which was worth twenty-five dollars, to George W. Beal, which he accepted and retained, with full knowledge of the provisions of the will. On the 28th of August, 1835, George W. Beal executed a quitclaim deed of the wheat lot, with other lands, to David B. Corey, which was duly recorded, and afterward, on the 18th of January, 1836, said Beal and wife executed another quitclaim deed to the plaintiff, which was also recorded. Corey and wife conveyed to the New York Central Railroad Company, and the title, through several intermediate conveyances, was transferred to the defendant. The referee found that the plaintiff had no title by documentary proof or adverse possession, and reported in favor of the defendant. The plaintiff duly excepted to the decision and findings of the referee. On the trial, the plaintiff objected to the declarations of William H. Beal, made at the time of the delivery of the deed from her to Marcellis and Winegar, which objection was overruled, and the plaintiff duly excepted.

C. W. White, for the appellant.

S. W. Jackson, for the respondent.

MILLER, P. J.:

The question presented upon this appeal is strictly one of legal title, and the plaintiff is bound to establish such title before she can maintain this action. The common source of title of both parties is the deed of Harmanus Vedder, in May, 1816, conveying certain premises to George W. Beal and Zebulon Cook, each of whom thus became seized in fee of an equal, undivided one-half thereof. The plaintiff claims title, First: By virtue of an instrument indorsed upon the mortgage, executed by Beal and Cook to Har-

manus Vedder, dated May 1st, 1816, upon the premises conveyed on the same day by said Vedder to said Beal and Cook, to secure the payment of \$3,500, which instrument grants and assigns the said mortgage to George W. Beal, Zebulon Cook, and to Sarah Beal, the mother of the plaintiff, from whom she claims to derive title to the premises, in the indenture of mortgage particularly described.

Second: Under a deed from Zebulon Cook and wife, dated September 15th, 1827, of a portion of the lot, including the premises in question, in consideration of \$1,500, to the plaintiff's mother, Sarah Beal, which was duly recorded on the 28th of September, 1827. In this connection it is also claimed, that Sarah Beal was a purchaser for a valuable consideration, and without notice of the deed from Vedder to Cook and George W. Beal, and her own deed from Cook and wife, being on record before the deed of May 1st, 1816, had the effect to vest her with the legal title to two-thirds of the premises, under the recording act.

I. As to the instrument or assignment upon the back of the mortgage, which constitutes the first muniment of title, I think that the assignees or grantees became tenants in common of the mortgage, each being entitled to the one undivided one-third part of the same. As Zebulon Cook and George W. Beal, two of the assignees or grantees, were the owners of the equity of redemption, two-thirds of the mortgage became immediately merged in the fee, and it only remained effectual, and a lien, for the remaining one-third, which was transferred, to and owned by Sarah Beal. This one-third could only be enforced against Cook and George W. Beal, and, when Cook conveyed to Sarah Beal one-half of the one-third she previously held, became merged in the interest so conveyed, leaving only one-sixth of the amount which remained, a lien upon the undivided half of the land which belonged to George W. Beal. The deed from Cook to Sarah Beal, conveyed the title to the one undivided half of the premises, and she became the owner of the same in fee, as to that, with a claim for the one-sixth, as mortgagee, upon the remaining one-half. Sarah Beal's devise of the wheat lot to the plaintiff, only gave her such title as was vested in Sarah at the time of her death, and no more. If the plaintiff became entitled to the interest of Sarah Beal in the mortgage, by

the devise to her, it was, I think, only such an interest as could be enforced by a foreclosure of the mortgage, when the question could be determined as to the extent of that interest or its validity, after it had remained unpaid for a period of time, sufficient to raise a presumption of payment. The mortgage itself, or so much of the same as was vested in Sarah Beal, did not constitute evidence of title which would authorize the mortgagee, or his assigns or representatives, to maintain an action of ejectment for the recovery of the possession of the mortgaged premises or any part thereof.* There are other objections to upholding the title of the plaintiff upon any such basis. It had ceased to be a lien by the operation of the statute of limitations, as more than twenty years had expired since a right of action had accrued on the same. And, as to David P. Corey and his assigns, it was invalid under the recording act, for the reason that Corey was a *bona fide* purchaser for value from George W. Beal, and his deed was duly recorded, while the mortgage was never put on record.†

II. The deed from Zebulon Cook and wife, to Sarah Beal, conveyed an undivided half of the premises, which he had acquired by virtue of the conveyance from Vedder, and there is no evidence that Cook, at this time, had any other or different title from that which he had thus acquired. There is no evidence that he had ever acquired the title of George W. Beal, or that he ever held possession of the premises in opposition to Beal's title. Cook was a tenant in common with Beal, and whatever possession he had, must be presumed to have been for the benefit of himself and his co-tenant. Every legal presumption is in favor of a possession in subordination to the title of the true owner, and, unless when possession is taken by one tenant in common, a clear and positive disclaimer and disavowal of the title of his co-tenant, and an assertion of an adverse right is made and brought to the knowledge of the co-tenant, there is no foundation laid for the operation of the statute of limitations. Such, clearly, was not the fact in the case at bar, and, by virtue of the deed in question, Sarah Beal only acquired a title to an equal, undivided one-half of the premises in dispute.

The recording of the deed from Cook to Sarah Beal, cannot, I

*2 R. S., 312, § 57.

†1 R. L., 372, § 2.

think, affect the rights acquired by George W. Beal under the deed from Vedder to him, because, 1st. The deed from Cook only conveyed his interest in the premises, which was an undivided half, and in no way affected the remaining half which belonged to George W. Beal. Sarah Beal, therefore, was not a subsequent purchaser for a valuable consideration, within the provisions of the Revised Statutes, so far as George W. Beal's interest was concerned.* 2d. As the deed to George W. Beal was executed in 1816, the provisions of the Revised Statutes could not affect the recording of it.† At the time when the deed was executed, the law did not require that it should be recorded, and hence the rule invoked has no application.‡ It is further insisted that the defendant is estopped from claiming that Sarah Beal was not the owner of the whole of the premises, for the reason that the deed from Cook and wife to her, recites a deed from Harmanus Vedder and wife to Zehulon Cook and Sarah Beal. The recital in the deed referred to, is a statement after the description of the premises, as follows: "As the same is described in a deed executed to both parties by Harmanus Vedder and his wife." This description may very properly be interpreted as referring to the instrument indorsed on the mortgage, as no other deed is introduced in evidence, and which included George W. Beal as well as the other two persons therein named. Assuming, however, that it did not, it can scarcely be claimed, I think, that the defendant is a party or privy, claiming solely under the deed from Harriet Beal to Marcellis and Winegar, of one-half of the premises, executed in 1859. It is true he claims for one-half under the last-mentioned deed, but he also claims the other half, under the conveyance by George W. Beal and wife, to David V. Corey, in 1835, and Corey's subsequent conveyance of the premises to the Central Railroad Company, and the intermediate conveyances, by virtue of which he acquired title.

If a privy or party, he could only be bound to the extent of his claim, and has a perfect right to maintain his title under another and a different source, to the one-half not embraced within the conveyance from Harriet Beal. It may also be remarked, that, inasmuch as the title, derived by the conveyance of Vedder to Cook

* 1 R. S., 756, § 1.

† 1 R. L. of 1813, 370, § 4.

‡ Varick v. Briggs, 6 Paige, 323; 22 Wend., 543.

and George W. Beal, dates anterior to the conveyance from Cook to Sarah Beal, the latter must be considered as a grant, subject to all rights which had previously been conveyed by Vedder, and cannot, in any way, affect the interest of George W. Beal, or the parties claiming under him. The plaintiff's counsel also claims that George W. Beal, by his acceptance of a legacy bequeathed to him by Sarah Beal, lost all title which he had acquired under the deed of Vedder to him and Cook, in 1816, to the undivided half of the premises. The legacy bequeathed, was a writing desk, of trifling value, and it is said that the acceptance of this bequest, was a renunciation of any title or claim which George W. Beal had to the wheat lot, which, by the same will, was devised to the plaintiff. The plaintiff seeks to apply a familiar rule in equity, called the doctrine of election, by which, one, who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing all rights inconsistent with it. And, if a testator has affected to dispose of property, not his own, and has given a benefit to the person to whom that property belongs, the legatee or devisee, accepting the benefit so given to him, must make good the testator's attempted disposition. If he insists upon retaining his own property, which the testator has attempted to give to another, equity will appropriate the gift, for the purpose of making satisfaction out of it, to the persons whom he has disappointed by the assertion of those rights.* It must be clear, beyond any reasonable doubt, that he has intentionally assumed to dispose of the property of the beneficiary, who is required, on that account, to give up his own gift.† There is considerable difficulty in the application of this rule to the case at bar. It is by no means clear that the testatrix intended, by the devise to the plaintiff, to dispose of more than her interest in the property. Every presumption is in an opposite direction, with no facts or surrounding circumstances to rebut such presumption. This rule is held not to be applicable, where the testator has some present interest in the property disposed of by him, although it is not entirely his own. In such a case, unless the intention to dispose of the whole estate, including the interest of third persons, is clearly manifest, he will be presumed to have intended to dispose only of

* Jarman on Wills, 385; Havens v. Sackett, 15 N. Y., 370. † 15 N. Y., 373.

that interest in the property, which he might lawfully dispose of.* This principle is applicable to cases where a legacy is given to the wife, and not expressed to be in lieu of dower, and it is held that she is not put to her election.† It is utterly improbable, and by no means inferable, upon any rational theory, that the testatrix intended to appropriate the property, and an entire one-half interest of her son, George W. Beal, and bequeath, in return for the same, the inadequate and small legacy named in the will. This is also a case, I think, where the expressions employed, are of such a character as will admit of being restricted to an interest belonging to, and disposable by, the testatrix, and, therefore, will not be held to apply to property over which she had no disposing power, within the principle decided in *Havens v. Sackett* (*supra*).

Even if the doctrine contended for, is applicable in cases where the intention is plain and clear, it is only a rule in equity, and, as the law abhors forfeitures, should not be held to apply in an action at law against an entire stranger and a *bona fide* purchaser for a valuable consideration.

While courts of equity may carry out and enforce the intention of parties, and do exact justice between them, and may compel one who has accepted a bequest or devise under a will, to renounce all benefits inconsistent with other provisions, in which other parties have an interest, I am unable to discover how a court of law can thus defeat a title. It is held that a devise by one who is not a legal owner, cannot transfer the legal title to the property, nor can it operate by estoppel, against the legal owner, who is also a beneficiary under the will.‡ The current of authority upon the question, which has been much discussed, whether the principle, governing cases of election under a will, is forfeiture or compensation, especially those of a recent date, is strongly and decidedly in favor of the principle of compensation; and it is said by Mr. Justice STORR, that the fair result of the modern leading decisions, is, that in such a case, there is no absolute forfeiture.§ The right of the

* 2 Story Eq. Jur., § 1089.

† Fuller v. Yates, 8 Paige, 325; Church v. Bull, 2 Den., 430.

‡ Gretton v. Haward, 1 Swanst., 425, cited in 2d Story Eq. Juria., § 1089, note.
§ 2 Story Eq. J., § 1085; 1 Jarman on Wills, Perkins' ed., 375, 376; Willard's Eq. Juris., 545, 546.

plaintiff, therefore, to apply the rule in question if the facts authorized it, is only capable of being enforced in an equitable action against George W. Beal, and his grantees who have notice of such equity. Corey, being a *bona fide* purchaser from George W. Beal, without any notice that the plaintiff had any latent equity, has a superior equity, I am inclined to think, to that of the plaintiff. The rule in equity is, that, as between two parties having equal equities, the prior equity must prevail; but if the party having the subsequent equity, clothes himself with the *legal title* before he has notice of the prior equity, such *legal title must prevail*. * It is, therefore, difficult to see how, even in an equitable action, the equitable right of the plaintiff, if any exists, could be enforced against Corey and his grantees.

The counsel for the plaintiff relies upon the case of *Padbury v. Clark*,† as an authority decisive of the question discussed. The case cited, is by no means analogous to the one at bar. The former was a bill in equity, and charged that one of the devisees had elected, and was bound to elect under the will. The testator was entitled, in that case, to a fee in an undivided moiety in two houses, and to another undivided moiety in a leasehold house, and, by his will, devised "all my freehold messuage or tenements," etc., referring to the two houses only, thus assuming that he was the owner of the whole, and not the one-half the houses; and, in another clause, devised "all that my moiety or half part of the whole," etc., "in the leasehold messuage," etc., to the defendant.

It was held that the words, first used, were a gift of the entirety, and raised a question of election, as against the party entitled to the other moiety who took beneficially under the will; and that this construction was corroborated by the fact of the testator's having used *apt words*, in disposing of his interest in the leasehold. The devisee would thus have received some compensation in return for the estate, which would have been surrendered by an election to take under the will. The Lord Chancellor decided that the defendant had not elected, but, as the rents were received by the trustee of the defendant or her father, for her use, and she had elected to take against the will, she was bound to make good to

* *Newton v. McLean*, 41 Barb., 286.

† 43 Eng. Ch., 2 McNaghten and Gorden, 298.

the disappointed party, the value of the property intended for her. The decision in the case last cited, was based upon the principle of compensation, and a note at the close of the case, lays down the rule, that the doctrine of election proceeds upon the ground of compensation and not of forfeiture, citing numerous authorities to sustain this principle. There is not a reported case in the books, which I have discovered, that maintains the doctrine, that the principle contended for, can be invoked in an action against an entire stranger, to defeat a legal title acquired from one who held a valid conveyance of the fee, and had parted with the same to a purchaser. The plaintiff has shown no such prior possession, as against the defendant, which entitles her to maintain this action, and, as she was only entitled to an equal undivided half of the property, which, on the 12th day of May, 1859, she conveyed to Marcellis and Winegar, has proved no title whatever to the premises in question. As the plaintiff proved no legal title, and must recover upon the strength of her own title, and not on the defects in the title of her adversary, it is not necessary to examine and consider the character of the defendant's title. I think there was no error in the admission of evidence, and even if the declarations of William Beal were objectionable, that they could not affect the result of the case. The decision of the referee was right, and the judgment entered thereon must be affirmed, with costs.

Present—MILLER, P. J., BOCKES and BOARDMAN, JJ.

Judgment affirmed, with costs.



JOHN J. BATES AND ANOTHER, PLAINTIFFS, v. DANIEL J. COSTER, DEFENDANT.

Statute of frauds—Sale—when void.

Defendant being desirous of purchasing a stallion colt, owned by the plaintiff, agreed that, if they would have him altered and keep him until he got well, he would give them \$1,000 for him. The plaintiffs caused the colt to be altered, and, after his recovery, tendered him to defendant, who refused to receive him. *Held*, that the contract, being oral, was within the statute of frauds and void; that it was a contract of sale, and not for work and labor to be performed.

When the thing bargained for is not *in esse* at the time of the contract—could

not then be delivered and accepted—but is to be afterwards manufactured or constructed, the contract is held to be one for work and labor, but, where the subject of the contract exists at the time *in solido*, but something is agreed to be done to it, to put it in condition for use, or to make it marketable, the contract is held to be one of sale, and void within the statute. To this rule there are perhaps some exceptions.

The case of *Mead v. Case* (83 Barb., 202) doubted.

EXCEPTIONS ordered to be heard in the first instance at the General Term.

The plaintiffs were the owners of a male colt, which the defendant proposed to purchase. After some conversation between the parties in regard to the appearance, value and price of the animal, the defendant said, according to the testimony of Baird, one of the plaintiffs, "if you will have him altered and keep him until he gets well, I will give you \$1,000;" and that Baird, with whom the conversation was had, replied, that he would "take it and have him altered to-morrow." According to another witness, the defendant said, "if you will castrate him, when he is well I will give you \$1,000 for him;" and that Baird replied, "I will do it." The plaintiff caused the colt to be immediately castrated, and when well, offered him to the defendant, who refused to accept him. Thereupon this action was brought. On the trial, the plaintiffs were nonsuited, on the ground that the contract, being oral, was within the statute of frauds and void.

An exception was interposed to this ruling, and the case was ordered to be heard in the first instance at General Term.

Samuel S. Edick, for the plaintiffs, cited *Mead v. Case* (83 Barb., 202); *Courtright v. Stewart* (19 id., 457); *Parker v. Schenck* (28 id., 38); *Downs v. Ross* (23 Wend., 275), dissenting opinion of COWEN, J.; *Bennett v. Hull* (10 Johns., 364); *Crookshank v. Burrell* (18 id., 58); *Parsons v. Loucks* (48 N. Y., 17); *Ferren v. O'Hara* (62 Barb., 527).

John O. Robinson, for the defendant, cited *Shindler v. Houston* (1 N. Y., 261); *Caulkins v. Hellman* (47 id., 449).

BOOKES, J.:

The contract was not in writing; no part of the purchase-price was paid; nor was the property delivered.

If, therefore, the contract was one *of sale*, it was within the statute of frauds and void.* This position is not denied; but it is insisted on the part of the plaintiffs, that the contract was for work and labor. When the thing bargained for is not *in esse* at the time of the contract—could not then be delivered or accepted—but is to be afterwards constructed or manufactured, the contract is held to be one for work and labor; as for a wagon, thereafter to be constructed, and the like.† This class of cases does not fall within the statute; and an action may be maintained for the contract-price, counting on the agreement as a contract for work, labor and materials. Again, when the subject of the contract exists at the time *in solido*, but something is agreed to be done to it, to put it in condition for use, or to make it marketable, the contract is held to be one of sale, and void within the statute. Yet the rule thus laid down has perhaps some exceptions. The case of *Mead v. Case*,‡ is a notable instance. The contract was for a marble monument, then complete in its general form, but was to be polished, lettered, finished and set up, at and for the price of \$200. This was held to be a contract for work, labor and materials, and binding. The court held that the agreement was one by which the party was employed to make or manufacture a monument, not then in existence. In this view, undoubtedly, the case was well decided. But the decision was by a divided court, and is of doubtful authority *on the facts proved*. It seems in conflict with several more recent cases. In *Fitzsimmons v. Woodruff*,§ the contract was for a marble mantle, then selected by the party, which was to be set up, with certain alterations, in his house situated in another town, at and for the price of \$80. This was held to be a contract of sale, and void under the statute. In *Cooke v. Millard*,|| the contract was for lumber to be dressed and delivered, and it was held to be a contract of sale, and void. In *Smith v. N. Y. C. R. R. Co.*,¶ it was held that a contract for the sale and delivery of a quantity of

* 2 R. S., 186, § 8.

† 18 John., 58; 1 Strange, 506; 21 Pick., 205; 8 Cow., 215; 1 Met., 283; 28 Barb., 38; 51 id., 532, 576; 26 id., 138; 48 N. Y., 17; 19 Barb., 455; 4 Rob., 216; 20 Barb., 138; 28 id., 38; 62 id., 517.

‡ 33 Barb., 202.

§ 1 N. Y. Sup. Ct. R., 3.

|| 5 Lansing, 242.

¶ 4 Keyes, 180.

wood, at the time in standing trees, was not a contract for work and labor, so as to take the case out of the statute; and WOODRUFF, J., likened that case to *Downs v. Ross*,* where the contract was for wheat, thereafter to be threshed and delivered, and to *Garbutt v. Watson*,† where the contract was with a miller, for flour, thereafter to be ground. It is said in many of the cases when this question has been considered, that the true test for determining whether the contract was one of sale or for work and labor, is to inquire whether the work to be performed, in order to prepare the property for delivery, was to be done for the vendor or the vendee. If for the former, the contract is one of sale, and void under the statute. According to the above cases, it must be quite obvious, I think, that the contract here under consideration, was one of sale, not one for work and labor. It was a simple contract for the sale of the colt, to be delivered at a future time, gelded and well, at the price of \$1,000. The animal was present before the contracting parties, and was the precise property agreed to be delivered. True, an operation was to be performed of great hazard, involving however little labor and trifling expense. The plaintiffs assumed the expense and risk, for they were to deliver the colt gelded and well. It was the animal that was contracted for, not the incident of castration. The labor, expense and risk of the operation, were for the plaintiffs. The animal was the subject of the purchase and sale, to be gelded before delivery. The language of BAYLEY, J., in *Smith v. Surman*,‡ well applies here; he says, "the vendor, so long as he was felling it [the timber] and preparing it for delivery, was doing work for himself and not for the defendant;" and he adds, "it was a contract for the future sale of the timber when it should be in a fit state for delivery." There was not, certainly, any idea of manufacture involved in the agreement in this case; no idea of compensation for work and labor, as such. In no fair and just sense, can this contract be deemed one for work and labor; it was manifestly a contract of sale for the price of \$1,000; and, not being in writing, was void by the statute of frauds.

* 23 Wend., 270.

† 5 Barn. & Ald., 618.

‡ 9 Barn. & Cress., 561.

THIRD DEPARTMENT, MAY TERM, 1874.

The case was properly disposed of at the trial, and the defendant is entitled to judgment.

MILLER, P. J., and BOARDMAN, J., concurred.

Judgment ordered for the defendant, with costs.

ESTHER GREGORY AND ANOTHER, RESPONDENTS, v.
BENJAMIN BROOKS, APPELLANT.

Partnership — Farm — agreement to work on shares.

An agreement was entered into, by which defendant was to work a farm of the plaintiffs on shares, which, after providing for the division of the crops, contained the following clause: "All the profits arising from the working and farming of said farm, to be divided equally between the parties to this agreement. All losses and gains upon said farm for one year from the 1st of March, 1870, is to be divided equally between the said parties." *Held*, that a partnership was not thereby created between the parties.

At the trial, the following question was put to defendant: "During the whole term was there a profit made or loss sustained in the general result? state all the facts." The referee refused to allow him to answer it. *Held*, that this was proper, as the question was too general; and that as the first part of it was clearly objectionable, that was sufficient to authorize its rejection as an entire question.

Defendant offered to prove the cost of picking, curing and baling the hops. *Held*, that the evidence was properly rejected, for the reason that by the terms of the contract, defendant was bound to perform this work, and because no such claim was set up in the answer.

There were two dwelling-houses upon the farm, one of which, before the making of the agreement, and during the continuance thereof, was occupied by the plaintiffs and the other by the defendant. The defendant offered to prove the value of the use of the dwelling occupied by the plaintiffs. *Held*, that as the agreement contained nothing in regard thereto, and as both parties had acted on the assumption that each was entitled to the possession of the house occupied by himself, that the evidence was properly rejected.

APPEAL from a judgment, in favor of the plaintiffs, entered upon the report of a referee.

This action was brought to recover the sum of \$264.05, alleged to be due the plaintiffs, under a written agreement to work plain-

tiffs' farm upon shares, for one year, the plaintiffs claiming that the proceeds of certain crops received by defendant, had not been divided. By the agreement, the plaintiffs let and leased to the defendant their farm, for the term of one year. The plaintiffs were to furnish eleven cows, one horse, three yearlings, fourteen sheep, and all farming utensils on the farm, excepting the mowing machine. The defendant was to furnish one horse, one cow; to keep the farming tools in repair upon the farm; to pay interest on the cash value of five cows, at their appraised value; to pay for the use of mowing machine, owned by the plaintiffs, at a price to be agreed upon, and to leave the farm in as good condition at the expiration of the lease as it was when taken possession of, and also as many acres of ploughed ground as there were on the 1st of March, 1870. The lease also contained the following covenant: "And it is further stipulated and agreed between the said parties, that the profits of ten cows are to be equally divided between the said parties to this agreement. That the threshed grain is to be divided when threshed, the potatoes when dug, the corn when husked; all grain crops, roots and vegetables to be divided by measure. All the profits, arising from the working and farming of said farm, to be divided equally between the parties to this agreement. All losses and all gains upon said farm, for one year from the 1st of March, 1870, are to be divided equally between said parties." The answer, after reciting the agreement, among other things, alleged: That no settlement or accounting has been had between the parties, and that all matters between them, relative to the occupancy of the farm under this agreement, including gains made and losses sustained, remain open, unsettled and unliquidated; and also, that in the management of said farm during the term, a net loss of \$150 was sustained by the defendant. In the prayer for relief, he asks that an accounting may be had, and that the plaintiffs may be adjudged to bear their share of the loss. The answer also set up a counter-claim, which was denied by the reply. The action was referred, by consent, to Hezekiah Sturges, as sole referee to hear and determine, and was tried before him June 13th, 1872.

After the plaintiffs had put the agreement in evidence, the defendant's counsel asked the referee to dismiss the complaint and order judgment for the defendant, upon the grounds that it

appeared from the contract in evidence that a partnership between the parties was created by the terms of said contract; that no accounting had been had, etc., and that an action at law could not be maintained; that plaintiffs' only remedy was an equitable action for an accounting. The referee denied the motion, to which ruling the defendant's counsel excepted.

The referee gave a report in favor of the plaintiffs, for \$166.74, with costs.

Exceptions to the report were taken by the defendant's counsel.

Upon the trial, objections were made and exceptions taken to the decisions of the referee, in regard to evidence, which are referred to in the opinion. A judgment was entered upon the referee's report, and the defendant appealed.

L. Burditt and Jenks & Matterson, for the appellant, insisted that by the agreement, the parties became partners. (*Champion v. Bostwick*, 18 Wend., 183; *Collyer on Part.*, 12, 13, Perkins' ed.; *Musier v. Trumbour*, 5 Wend., 274; 16 Johns., 34; *Parsons on Part.*, 36; *Allen v. Davis*, 13 Ark. R., 28.)

J. E. Dewey and G. S. Gorham, for the respondent, cited, as to the question of partnership, 1 *Parsons on Cont.*, 60; *Putnam v. Wise* (1 Hill, 234); *Tanner v. Hills* (44 Barb., 428); *Chitty on Cont.* (232, 233); *Smith v. Watson* (2 B. & C., 401); *Tripp v. Riley* (15 Barb., 333); *Dinehart v. Wilson* (15 Barb., 595); *Chase v. Barrett* (4 Paige, 148).

MILLER, P. J.:

Although the language employed in the concluding portion of the article of agreement between the parties, of itself and alone, might be interpreted as establishing the relationship of a partnership between them, yet, looking at the intention of the parties, as expressed in the agreement, and as may be inferred from the surrounding circumstances connected with the transaction, * I am of the opinion that no partnership was established. It is apparent, from the contract, that the agreement was in the nature of a contract for the working of a farm on shares, or for the cropping of

* 1 *Parsons*, p. 60.

the same by the defendant, and the delivery of a portion of the avails to the plaintiffs for the use of the farm. This does not, as I understand, constitute a copartnership, in the ordinary acceptation of that term. Even if a partnership was made out, inasmuch as the parties were allowed to prove the claims which they had against each other, and a full accounting was had between them, of all the transactions arising under the contract, I am at a loss to see how that question can be of any importance in disposing of the case.

It is true that the action was to recover at law, and the complaint did not contain the usual averments, demanding an account, which would be employed in a bill in equity for an accounting between copartners, but the complaint and answer together presented the claims of each of the parties, and the whole subject-matter of the controversy was fully investigated. Under the liberal rules as to amendments, established by the Code of Procedure, even if the complaint was insufficient, I think it may be considered as amended to meet the facts proved, if any such amendment is required to answer the ends of justice. From the observations made, it follows, that there was no error on the part of the referee in any of his rulings as to the copartnership, and if there was they are not of a character to demand a reversal of the judgment.

Some objections are urged as to the admission and rejection of evidence offered, which require consideration.

1. It is said the referee erred in rejecting the offer to prove the loss sustained on the horse bought by the defendant of the plaintiffs, and used under the contract, and that the same was unsound, and represented to be free from disease. It is difficult to see how the plaintiffs could be made responsible for a deterioration in value, occasioned, as the offer showed, by disease contracted while engaged in labor upon the farm. The offer to show a breach of warranty, was not pertinent to the issues made, and if it had been, it is a sufficient answer to say that no such defense was interposed by the defendant.

2. There was, I think, no error in excluding the question put to the defendant, as follows: "During the whole term, was there a profit made or loss sustained in the general result? state all the facts." The question was objected to, as too general, and as

incompetent, and it is plain that it was liable to the first objection, at least. The first part of it was clearly objectionable, which was sufficient to reject it as an entire question. The latter part also embraced a scope of inquiry, which it was the province of the referee to restrict within proper limits. The inquiry should have been made more specific, so as to show the relevancy of the question put. It may also be remarked that the general offer to show the expense of working the farm, was not relevant under the agreement, and did not affect the right of the plaintiffs to demand an accounting for their share of the produce, which the defendant had appropriated and used. The question was what the defendant had received and converted, or refused to divide, and not what profit he had made, or loss he had sustained.

3. The offer to prove the cost of picking, curing and baling the hops, was properly overruled, for the reason that, by the terms of the contract, the defendant was bound to perform this work, and because no such claim was set up in the defendant's answer.

4. The offer to show by items, that the cost, in cash paid out, of raising the hops and preparing them for market, exceeded the amount received, could in no view have been competent, as this was a part of the contract which the defendant had agreed to perform.

5. The proof of the value of the use of the cow on the farm, used by the plaintiffs, was properly overruled, as the lease provided that the plaintiffs were to put eleven cows on the farm, and the defendant one, and the profits of the ten were to be divided, thus providing for the use of one cow for each family.

6. I am inclined to think that there was no error in the refusal of the referee to allow proof by the defendant, of the value of the use of the dwelling-house and out-buildings, occupied by the plaintiffs during the term. Nothing is contained in the agreement in regard to the dwelling-houses; and the two dwelling-houses on the farm were occupied, the one by the plaintiffs, who continued to occupy as before the contract, and who never gave up possession to the defendant, and the other, by the defendant, who never claimed possession of the other dwelling-house, each family cultivating one-half of the garden. There was no implied promise to pay rent, by the plaintiffs, and no relation of tenant to the defend-

ant, created by the agreement, and both parties acted upon the assumption that each was entitled to the possession of the buildings occupied by them, respectively, and acquiesced in this practical construction of the contract.

7. The proof of milking the cows by plaintiffs for defendant, was also competent, and, as plaintiffs were partners in the farm, was a proper charge against the defendant.

There was no error upon the trial, and the judgment must be affirmed, with costs.

Present — MILLER, P. J., BOOKES and BOARDMAN, JJ.

Judgment affirmed, with costs.

AMBROSE FOWLER, RESPONDENT, v. ELSIE TRULL,
APPELLANT.

Married woman — Unauthorized acts of agent — ratification of — Neglect to read paper before signing it — effect of paper not avoided by.

The husband of defendant, who was the owner of a separate estate, purchased certain merchandise and took a bill of sale of the same in her name, without her knowledge and without authority. At the time of the sale, the defendant gave her own note, secured by mortgages assigned by her, for a portion of the purchase-money, and a chattel mortgage upon the property purchased, to secure the remainder thereof, and subsequently executed a second chattel mortgage upon the same property to a third person. *Held*, that by these acts, she ratified the unauthorized acts of her husband, and that she was liable for the price of the goods so purchased by him.

The defendant testified that she did not know what she was signing, when she signed the chattel mortgages; *held*, that as it appeared from the evidence that she signed them voluntarily, without misrepresentation or fraud, that their effect could not be avoided by her negligence or omission to read them.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee. The action was brought to recover a balance of \$943.74 with interest, for merchandise sold and delivered to the defendant's husband, as was claimed, as the agent of the defendant, who was a married woman. The negotiations were conducted by the husband with the plaintiff. The sum of \$200 was paid in cash, and the balance secured by the note of the defend-

ant, a mortgage being assigned by her as collateral security thereto, and by a chattel mortgage given by her on the goods purchased, containing the usual covenant to pay the amount secured. The testimony material, as well as the rulings on the trial, are stated in the opinion. The referee reported in favor of the plaintiff, and the defendant appealed. The case was submitted upon printed points.

John F. Porter, for the appellant.

Henry A. Merritt, for the respondent.

MILLER, P. J.:

It appears from the evidence in this case, that the defendant's husband made the purchase of the property and took a bill of sale, of the same, in the name of his wife, the defendant, without any authority from her, and without her knowledge; that she never took possession of the property, and that the business was carried on in his name afterward, and not for the benefit of the wife's separate estate. If there were no other facts connected with the transaction, there would be no question that the defendant was not liable. But it appears that the defendant gave her own note, and assigned mortgages as collateral security for a portion of the purchase-money, which note was afterward paid, and that she also executed a chattel mortgage on the property sold, to secure the balance which remained unpaid upon the sale. It is also proved that subsequently, and on the 15th day of November, 1870, she executed another chattel mortgage to one Crawford, upon the same property. By these acts, she assumed ownership and control over the property sold, and, I think, ratified what her husband had done on her behalf at the sale, claiming, as he did, according to the plaintiff's testimony, to act as her agent. It is true, that the defendant testifies that her husband had no authority; that she did not know what she was signing, when she executed the chattel mortgages; and that the one given to Crawford, was without consideration. This, however, does not relieve the defendant, and, inasmuch as she voluntarily signed these papers, in the absence of misrepresentation or fraud, with ample opportunity for informa-

tion as to their contents, the effect cannot be avoided upon the ground of negligence, or omission to read, or to avail herself of such information.* There is no sufficient ground for claiming that the defendant's signature was procured by fraud, and the mortgages as executed, are far more than presumptive evidence, and, I think, must be regarded as a ratification of the acts of her husband, even if he acted without authority originally, † and a ratification of at least a part of an unauthorized transaction of an agent, or of one who assumes to act as such, which amounts to a confirmation of the whole, and binds the principal. ‡ As no fraud was shown, and, as the defendant, by writing, adopted the representations made by her husband when the contract of sale was made, she is estopped from denying her liability. If the views expressed are correct, then proof of the husband's declaration to the plaintiff, at the time of the sale, was proper, as the agency of the husband was ratified by the subsequent acts of the defendant, and there was no error, either in receiving or in refusing to strike out, this testimony.

The judgment was right and must be affirmed, with costs.

Present — MILLER, P. J., BOOKES and BOARDMAN, JJ.

Judgment affirmed, with costs.

PATRICK ORGAN AND ANOTHER, RESPONDENTS, v. NEIL STEWART, APPELLANT.

Compromise — when sustained — Conditional delivery — Statute of frauds.

Defendant being the owner of three lots of wool, the plaintiffs entered into an agreement with him for the purchase thereof, in pursuance of which, two lots were delivered, and payment therefor was demanded by the defendant, and refused by the plaintiffs, who claimed that the third lot was included in the agreement, which was denied by the defendant. Subsequently, an agreement was entered into by the parties, embracing the third lot of wool, which was to be handled and delivered by the defendant, at Troy, at the original contract price, in pursuance

* Breese v. U. S. Telegraph Co., 48 N. Y., 182.

† Story on Agency, 288.

‡ Farmers' L. & T. Co. v. Walworth, 1 N. Y., 433.

of which the plaintiffs paid the defendant \$18,357.60, the price of the wool already delivered, as part of the purchase-price of the whole of the wool. The defendant having refused to deliver the third lot of wool, this action was brought by the plaintiffs to recover damages therefor. *Held*, that the second agreement was valid as a compromise of doubtful and conflicting claims, and that, by the payment of the \$18,357.60, as part of the purchase-price of the whole of the wool, the contract was taken out of the statute of frauds.

APPEAL from a judgment, in favor of the plaintiffs, entered upon the report of a referee.

The plaintiffs were wool dealers, residing in Troy; the defendant, a farmer, residing in York, Livingston county. In January, 1871, the plaintiff, Organ, went to Livingston county to buy wool. The defendant had two lots of wool at his residence, and a third lot at Fowlerville, about three miles from his residence. Negotiations were entered into between the parties, which resulted in the parol sale of the two lots of wool at defendant's residence, and the conditional sale of the Fowlerville lot, if the parties could agree upon the manner in which it should be shrunk. The two lots of wool were subsequently delivered to the plaintiffs, but a dispute having arisen as to the shrinkage of the Fowlerville lot, the defendant refused to let them have the wool stored there, and claimed that it was not included in the sale; the plaintiffs, claiming that it had been and was included in the sale, and that it was to be shrunk by them and sold by the defendant at their shrinkage, demanded its delivery, and this being refused, they refused to pay for the wool already delivered. Subsequently an agreement was entered into, by which the Fowlerville wool was to be delivered by the defendant at the store of one Ranken, in Troy, and sorted and shrunk by the said Ranken's assorters, and delivered to the plaintiffs, who were to accept the same at the shrinkage as made by them, at the price just agreed upon. The plaintiffs thereupon paid to the defendant \$18,357.60, the price of the wool already delivered, as part of the purchase-price of the whole of the wool.

Subsequently, Ranken refused, at the request of the defendant, to receive the wool, and the defendant having refused to deliver it to the plaintiffs, this action was brought.

The answer denied the contract, and set up as a counter-claim, a balance due upon wool sold.

Samuel Hand, for the appellant. The second agreement was void for want of consideration. (*Converse v. Kellogg*, 7 Barb., 590; *Crosby v. Wood*, 2 Seld., 369; *Hunt v. Bloomer*, 5 Duer, 202; *Van Allen v. Jones*, 10 Bosw., 369; *Gibson v. Renne*, 19 Wend., 389; *Bridgman v. Dean*, 7 Exch., 199). Nor could it be sustained as a compromise. (*Morey v. Town of Newfane*, 8 Barb., 645; *Bunge v. Koop*, 48 N. Y., 225; *Thomas v. McDaniel*, 14 Johns., 185.)

Irving Browne, for the respondents. The second agreement was simply a modification of the original contract, and need not be in writing. (*Goss v. Lord Nugent*, 5 Barn. & Adol., 65; *Stead v. Danober*, 10 A. & E., 57; *Cuff v. Penn*, 1 M. & S., 21; *Blanchard v. Trim*, 38 N. Y., 227; *Boutwell v. O'Keefe*, 32 Barb., 434; *McKnight v. Dunlop*, 5 N. Y., 537; *Allis v. Read*, 45 N. Y., 142.) The defendant is estopped from denying that the payment was made on account of the three lots of wool. (*Dezell v. Odell*, 3 Hill, 215; *Gregg v. Wells*, 11 Ad. & El., 90; *Lowry v. Tew*, 3 Barb. Ch., 413; *Wetmore v. White*, 2 Cai. Cases, 87; *Cox v. Cox*, 5 Rich. S. C Eq., 365; *Ryan v. Dox*, 34 N. Y., 311.)

BOOKES, J.:

At the time the parties met at Troy, serious matters of difference existed between them. The plaintiffs claimed that the original contract of sale embraced the Fowlerville wool, and they insisted upon its delivery, and refused to pay for the wool, already delivered, unless their claim was acceded to, and the agreement performed on the part of the defendant, according to its terms, as they asserted the contract to be. On the other hand, the defendant insisted that the contract did not embrace this lot of wool, and claimed pay for the wool delivered. Under this condition of affairs, the parties entered into a new, or substituted agreement, embracing the Fowlerville wool, which was to be "handled" and delivered at Troy; all at the original contract price of forty-five cents per pound; and the plaintiffs were then to pay for the two lots already delivered. Thereupon, the plaintiff paid the defendant \$18,357.60, the price of the wool already delivered, which payment, as the referee finds, was made upon the new or substi-

tuted contract, "as part of the purchase-price of the whole of the wool." The defendant then refused to deliver the Fowlerville wool, and the action is brought to recover damages therefor.

The contract was not in writing, and it is claimed, on the part of the defendant, that it was void by the statute of frauds. This position is based on the hypothesis that the original contract of sale did not embrace the Fowlerville wool; and that the payment made to the defendant was in satisfaction of the other wool already delivered; thus leaving the contract for the Fowlerville wool to rest in parol, with no part of the property delivered, and without payment of any part of the purchase-money. This view of the case is, I think, unsound. It is at least questionable whether the defendant should not be held to be estopped from asserting or claiming any advantage from the former or original agreement, inasmuch as he accepted the plaintiffs' money on the new or substituted agreement, and in part payment of the entire purchase-price agreed to be paid for all the wool, by that contract agreed to be delivered. But be that as it may, there were substantial matters of difference between the parties, at the time the new agreement was made, susceptible of being compromised, and proper to be adjusted and settled by them. There was a question whether the original contract did or did not include the Fowlerville wool. The plaintiff insisted that it did; and refused payment for any of the property until the defendant made delivery of that lot according to the terms of the purchase, as he claimed the contract to be. The Fowlerville wool was certainly considered in their first negotiation, for the parties commenced to "handle" it, with a view to its delivery, as the plaintiffs claimed, pursuant to the original contract of sale, when a disagreement arose in regard to the "handling" of it, and delivery was refused. The defendant, on the other hand, denied all obligation to deliver this lot of wool; insisted that it was not embraced within the contract of sale; and demanded payment for what had been delivered. There is nothing in the case showing that these claims by the parties, respectively, were not made in good faith, and under the full belief by each that the other was in the wrong in regard to the matters of disagreement. Their assertions and claims were not put forward, evidently, without any ground to support them, as a ruse or fraud.

Indeed, they respectively vindicated their views and claims by their own testimony on the trial of this case; and the fact that it was then decided that one was in error, does not show that the compromise was without ground of support. At the time of the agreement at Troy, the claims of the respective parties, as to the terms of the original contract of sale, were, to say the least of them, doubtful, and it could only be determined which was right, by actual trial, and then could only be decided on conflicting evidence. A compromise of a doubtful claim will be upheld, and when an action is brought upon such agreement of compromise, it is no defense to show that the claim was not a valid one.* In the last case cited, COWEN, J., says: "In such cases it matters not on which side the right ultimately turns out to be. The court will not look behind the compromise." In another case, it was said that any matter that may be litigated, may be settled. There are numerous decisions to the same effect as the above. Now, it must not be understood that a groundless claim, put forward without any show of right, a mere pretense, urged as a ruse or fraud, can be deemed a *doubtful* claim. There must be a real and substantial matter of dispute and controversy. Such was this case, and only by a judicial examination and a decision on a conflict of evidence, could the claims of the respective parties be determined. But this is not all of the case, for it appears, on the face of the record, that the defendant also had a claim against the plaintiffs for damages, growing out of the original contract of sale, which, of course, was covered and extinguished by the compromise effected by the new agreement. This claim is set forth in his verified answer herein. Besides, if it be true, as the defendant claimed, and still claims, that there was no ground for the pretense on the part of the plaintiffs, that the Fowlerville wool was embraced in the original contract of sale, and that he was entitled to demand, and have payment for the wool actually delivered; then and in that case he had not, in fact, parted with his title to the wool delivered, and he might, then, at Troy, have reclaimed his property, on refusal by plaintiffs to pay, as they had agreed, on delivery. According to the proof in this case, he had waived nothing, and was not barred the right of reclamation by the

* *Crans v. Hunter*, 28 N. Y., 389; *Russell v. Cook*, 8 Hill, 504.

delivery, under the expectation of payment, according to the contract, which called for payment on delivery. He lost no time in seeking payment. If the wool was delivered on the faith of the promise to pay on delivery, and with the expectation that the promise would be fulfilled, the fact that the plaintiffs had immediately run it off to Troy, would not prevent the defendant from obtaining reclamation of it, if payment was refused. In *Leven v. Smith*,* the goods having been sold, to be paid for on delivery, JEWETT, J., says: "Payment and delivery were to have been simultaneous. No credit was given, and there is no evidence that the delivery to the defendant was intended to be absolute, or that the condition of payment was waived; and the mere handing over of the goods under the expectation of immediate payment, did not constitute an absolute delivery. The defendant, after such delivery, held the goods in trust for the plaintiffs until payment was made or waived."† The defendant, therefore, had not lost his right to the property, and could have reclaimed it at the time of entering into the new contract of sale, in case he was right in his position that the original agreement did not embrace the Fowlerville wool. This right was barred by the new contract, and his acceptance of the sum of \$18,357.60 thereon. Now it is quite apparent that the new contract of sale was brought about by mutual concessions, and this constitutes the very essence of compromise. All points of difference and conflicting claims, including right of property, were adjusted and settled by the new contract, in pursuance of which, a large amount of money was paid by the plaintiffs and accepted by the defendant. In effect, the agreement at Troy, and the action of the parties under it, amounted to a new contract of sale of the three lots of wool, with delivery of two lots, and payment down of the principal part of the purchase-price. The agreement, therefore, became, and was, valid and binding on the parties.

The breach by the defendant is well found, and the referee,

*1 Denio, 571.

† See also *Fleeman v. McKean*, 25 Barb., 474; *Hays v. Currie*, 3 Sandf. Ch., 688; *Van Neste v. Conover*, 8 Barb., 509; *Smith v. Lynes*, 5 N. Y., 41; *Hammett v. Man*, 48 id., 899.

in so far as is made to appear, committed no error in awarding damages.

BOARDMAN J., concurred.

Judgment affirmed, with costs.

CHRISTOPHER MATZE, PLAINTIFF, v. THE NEW YORK
CENTRAL AND HUDSON RIVER RAILROAD COM-
PANY, DEFENDANT.

Railroad Company—Trespasser upon lands of—duty of company toward.

The plaintiff, while crossing defendant's track, in the evening, at a point where a street was to be, but had not yet been laid out, but where people were in the habit of crossing and recrossing, was struck by one of defendant's engines and injured. *Held*, that he was guilty of contributory negligence in going upon defendant's track, and that he could not recover.

The court charged that, even if the public had no right to use the land of the defendant, at the place where the plaintiff was injured, yet, if people were in the habit of crossing and recrossing there, that the company was bound to use care and caution in running at that point. *Held*, that this was error; that no right could be acquired by the public in such a manner, without evidence of notice to the company and subsequent acquiescence by it.

Even if there was any evidence from which a license might be inferred, such license created no legal right and imposed no duty upon the defendant, except the general duty, which every man owes to others, to do them no intentional wrong or injury.

MOTION for a new trial on exceptions, ordered to be heard at the General Term in the first instance.

The action was brought to recover damages for personal injuries sustained by the plaintiff, by reason of the negligence of the defendant. It was tried before one of the justices of this court and a jury, at the Albany Circuit, in June, 1873. The facts are stated in the opinion.

At the close of the plaintiff's testimony, the defendant's counsel moved for a nonsuit, on the following grounds:

First. No negligence has been shown on part of defendant.

Second. The evidence shows that the plaintiff's injury was caused, or contributed to, by his own negligence.

Third. That the plaintiff was improperly on the track of the defendant; that he was not using it for the purpose of a crossing, but was using it for his own convenience, and without the consent or permission of defendant, and cannot, therefore, maintain this action.

At the close of the whole case, the motion for nonsuit was renewed upon the grounds stated before, and upon the further ground that it appeared affirmatively, that, at the time of this accident, the city had done nothing to throw the street open to the public, and had not graded it, and it was not in a condition to be used as a street, and that the city had not, at that time, become entitled to cross the lands of the defendant. The judge denied the motion, and the defendant's counsel duly excepted.

The court, among other things, charged, that "if persons were passing and repassing there, going to Dedrick's and to the Observatory, and to the Tivoli Hollow, then it is undoubtedly true that the defendant should exercise care, as plaintiff claims;" to which the defendant excepted.

The defendant's counsel asked the court to charge that the place where plaintiff was injured, was not a highway, and the court so charged.

Defendant's counsel asked the court to charge that the public had no right to use the land of the defendant, at the place where plaintiff was injured. The court said: As an abstract proposition, you are right; *but if they were in the habit of crossing and recrossing upon that track, they were bound to use care and caution in running at that point.*

Defendant's counsel excepted to the qualification.

Defendant's counsel asked the court to charge that the plaintiff had no right to be upon defendant's track, at the place where he was injured. The court said: That is true, with the qualification I have already stated. Defendant's counsel excepted to the refusal and qualification.

Defendant's counsel requested the court to charge, that the defendant owed no duty to plaintiff, except to do him no intentional wrong or injury, under the evidence, and the court so charged.

The jury found a verdict, in favor of the plaintiff, for \$1,000,

and the court ordered that the bill of exceptions to be made, be first heard at General Term.

Matthew Hale, for the defendant.

Henry Smith, for the plaintiff.

MILLER, P. J.:

The plaintiff was injured while crossing the track of the defendant's railroad, within the corporation limits of the city of Albany. The plaintiff was a mechanic, and upon returning home from his work, on the evening of the day upon which the accident occurred, proceeded down some steps to the railroad track of defendant, walked along on the east side of the track, upon a sidewalk, and then, because it was bad, took the middle of the east track, some fifty or sixty feet toward Albany, until he came to a malt-house; then crossed over to the west track, where two tracks came near together, and to about the middle of what was claimed to be a street, where, after looking to see if trains were approaching, he turned to look toward Schenectady, when an engine came along, caught him on the left arm, by the part of the machine at the side, knocked him down across the track, when the wheel ran over his left leg and cut it off. At the place where the plaintiff was injured, proceedings had been taken to lay out a street; awards had been made to the owners of the land, and all but the defendant had been paid. There was proof to show that the alleged street was being graded, and that the teams working on it passed through. It appeared, however, that the city had not done any work in opening or grading the street, or in taking possession of the railroad over which it was located, but there was evidence that people had been in the habit of passing and repassing on foot, to and from the Observatory, and to Tivoli Hollow and Dedrick's, by a foot-path. I think the court erred in refusing the motion for a nonsuit. It is apparent that there was no highway or street laid out where the accident occurred. This was very properly, I think, assumed by the judge in his charge, as the case is entirely destitute of any evidence showing that such was the fact.

The question then, arises, whether the use of the defendant's

land, for passing and repassing in the manner stated, was of such a character as to give the plaintiff and other parties, a right which imposed upon the defendant the duty of exercising care and caution towards strangers, who chose to trespass upon defendant's land? I am not aware of any legal principle, upon which any such right can be upheld. The defendant had an exclusive right to the use of its track at the place where the plaintiff was injured. The plaintiff was there without any authority whatever, and was, therefore, guilty of negligence in being on the track at the time, which negligence contributed to the injury, and should have been a ground for nonsuit.

The fact that other persons were in the practice of passing at the place named, did not, of itself, confer any right upon the plaintiff, or impose any additional duty upon the defendant, and the court was clearly wrong in charging to the contrary, in effect. No right of the public can be acquired in such a manner; at least, without evidence of notice, and acquiescence afterward. If such a theory could be permitted to prevail, railroad corporations might be subjected to serious liabilities, without their knowledge or consent, by the action of individuals, assuming to establish rights which are entirely unauthorized. I do not understand that they owe any duty, even, to the owner of a private right of way, through which they pass, which calls upon them to exercise care in the running of their trains; much less should it be imposed near a populous city, where trespassers expose themselves to injury without license. They are not bound to look out for those, who, without a particle of right, intrude upon their tracks. Such an act is unlawful and not to be expected, and it matters not whether the population be large or small, the rule of law is unswerving and cannot be changed to meet the exigencies of varying circumstances, which may attend unlawful trespassers upon their property. It is enough, in this case, to defeat plaintiff's action, that the plaintiff was on defendant's track without license or permission, and with no proof to show that he was invited, or that any of the defendant's officers or employes had knowledge that it was appropriated to any such use. The principle stated is fully upheld in *Phil. & R. R. Co. v. Hunnells*.*

* 44 Penn., 375-379, 380. See also *Bush v. Brainard*, 1 Cow., 78.

Even if there was any evidence from which a license might be inferred, and the plaintiff was not a trespasser, such license created no legal right and imposed no duty upon the defendant, except the general duty which every man owes to others, to do them no intentional wrong or injury.* The court charged in accordance with this proposition, which of itself, I think, authorized a nonsuit.

The court was in error, in the refusal to charge the various requests, made by the defendant's counsel, which it did not charge, and for these errors, as well as the refusal to nonsuit, a new trial must be granted, with costs to abide the event.

Present — MILLER, P. J., BOOKES and BOARDMAN, JJ.

New trial granted, with costs to abide the event.

PETER E. N. DECKER, RESPONDENT, v. FRANK F. SALTS-
MAN AND ANOTHER, ADMINISTRATORS, ETC., APPELLANTS.

*Bounties — contracts in relation to — void as against public policy — Complaint —
amendment of, at trial.*

In August, 1864, the son of John Saltzman, the defendant's intestate, being liable to be drafted, Saltzman entered into an agreement with the plaintiff, whereby he agreed to pay him \$500, and that he, the plaintiff, should have all the county and town bounties that his son or any substitute he should procure, would be entitled to, if he, the plaintiff, would furnish a substitute for his son. The plaintiff furnished the substitute and received from the defendant \$500, and the bounty which the county was then paying. Subsequently the town passed a resolution to pay \$425 to certain volunteers and substitutes, among whom was the substitute furnished by plaintiff. Saltzman obtained from the town authorities \$100 of this bounty, to recover which, this action was brought against him for money had and received for use of the plaintiff. *Held*, (1.) that no one but the substitute or his assignee was entitled to the bounty. (2.) That the claim, at the time of the agreement, was no more than a mere contingent possibility, not coupled with an interest, and hence incapable of being sold and assigned. (3.) That the agreement between the plaintiff and Saltzman, in so far as it related to bounties thereafter to be voted and offered, was void as against public policy. (4.) That the plaintiff was not entitled to recover.

The complaint was for money had and received by the defendant, to the plaintiff's use. At the trial, plaintiff was allowed to prove an assignment from

* Nicholson v. Erie Railway Co., 41 N. Y., 530.

the substitute, of his claim to the bounty. *Held*, that the evidence was inadmissible, as it tended to show a new and independent cause of action not set out in the complaint.

Barber v. Marble (2 N. Y. S. C. R., 114, and *Career v. Croque*, 46 Barb., 507) distinguished.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, at the trial of the cause in the County Court of Cortland county.

This action was originally brought in a Justice's Court, and came to the County Court by appeal, where it was retried, and a verdict given for the plaintiff for \$107. The defendant appealed to the General Term from an order denying a motion for a new trial, upon a case and exceptions, where the order was reversed and a new trial ordered. The following opinion was delivered by PARKER, J., in which the facts of the case are stated :

PARKER, J. :

This action was originally brought in a Justice's Court, and came to the County Court of Cortland county by appeal, where it was retried and a verdict given for \$107 for the plaintiff. A motion was made for a new trial, upon a case and exceptions, which was denied, and, from the order denying the motion, an appeal to this court is taken.

The complaint is for money had and received by defendant, to plaintiff's use, and the facts relied upon by plaintiff are as follows :

In August, 1864, the defendant's son being liable to be drafted, under the call of the President for 500,000 men, the defendant entered into an agreement with the plaintiff, whereby he agreed to pay him \$500, and that he (the plaintiff) should have all the county and town bounties that his son, or any substitute he should procure, would be entitled to, if he (the plaintiff) would furnish and put into the service a substitute for his son, which would clear him from both the United States and the State militia draft. The plaintiff did furnish the substitute for three years' service, or during the war, who was regularly enrolled, and was credited to the town of Virgil, in the county of Cortland, where the defendant and his son resided. The defendant paid the plaintiff the \$500, and the plaintiff obtained the county bounty of \$500, which

was then being paid for volunteers and substitutes. Subsequently, and on the 10th of September, 1864, the town of Virgil, at a special town meeting, passed the following resolution :

Resolved, That we pay the sum of \$425 to each volunteer and substitute who have or shall enlist, and be credited to the town of Virgil, upon the quota of said town, under the last call of the President for 500,000 men, and who have or shall be mustered into the United States service.

On the 10th of November following, the defendant presented to the town board, a claim "for \$100 balance on town bounty for three years' man, furnished as a substitute," which claim was paid out of the moneys voted on the tenth day of September, as above stated. The plaintiff, claiming that he was entitled to the town bounty, afterward demanded the \$100 of the defendant, and on his refusal to pay it over to him, brought this suit.

Neither of the parties to this action had any claim whatever upon this town bounty ; their arrangement was not, in any respect, based upon the faith of it. It had not, at the time of such arrangement been voted, nor, so far as appears, even contemplated. By the terms and spirit of the resolution, it was provided for the volunteer or substitute who had enlisted or should enlist, and be credited to the town. No one but West, the substitute, or his assignee, therefore, was entitled to it.

One hundred dollars of this bounty thus belonging to West, the defendant obtained from the town authorities. Granting that the terms and intent even of the agreement between the parties, included this among the bounties which the defendant agreed the plaintiff should have, the question arises, what is the effect of such agreement in regard to the bounty in question ?

Manifestly, it did not confer upon the plaintiff any present or prospective right to that bounty—both because the bounty did not, when created, become the property of the defendant, and because if it had, it being at the time of the arrangement no existing right or property, but a mere contingent possibility, not coupled with an interest, it was incapable of being sold.* And not only was there no property in the bounty transferred to the plaintiff, but the agreement did not, and could not operate to bind the defendant to pay over

* 1st Parsons on Contracts, 523 ; 1st Pet., 193-213.

the moneys received by him from the town authorities, on account of the bounties. Even if the agreement can be construed to intend such effect, still I think what Judge COWEN said, in *Munsell v. Lewis*,* correct, when applied to parties situated as these were. After adverting to the proposition, that, although a man cannot assign moneys to be recovered for a personal tort "*eo nomine*," yet he may bind himself to pay them when received by him. He says: "But I deny that a man may traffic even to that extent in the charity of his neighbors or the prospective bounty of his government."

Without questioning the modified doctrine held in *Carver v. Creque*,† that where a recruit enlisted in anticipation of the bounty then about to be voted, and in the expectation that it would be realized by him, he had an equitable right to it, as subsequently voted; which right he could sell and transfer before the vote was taken, so that when the proceedings ripened into a legal claim in his favor against the town for the amount of the bounty, it rested as such in the assignee. Still I think that, as between these parties, both outsiders, having no connection with or relation to, the bounty, either as being the persons for whom it was intended, or assignees or transferees of such persons, the more stringent doctrine of Judge COWEN applicable.

A contract between such persons, that as between the two, one shall be entitled to the bounty, if granted, to the exclusion of the other, must be entirely nugatory; for besides the objection that neither will have any interest as is known to each, in the bounty—the subject-matter of the contract—if granted, it is against public policy to permit such gambling contracts to be made between outsiders, in reference to soldiers' bounties thereafter to be voted and offered, not only as tending to corrupt influences in procuring them to be offered, but also as tending to deprive the persons for whom they were intended, of the due benefit of them. The contract, as claimed by the plaintiff, *appropriates* the then existing and all prospective bounties, offered and to be offered to the soldier who should enlist, and which then belonged or would belong to West, the substitute, by an agreement of the parties, to the plaintiff. It does not contemplate a purchase by defendant from West,

* 4 Hill, 641, 642.

† 46 Barb., 507; affirmed, 48 N. Y., 385.

of the bounty, for the purpose of handing it over to plaintiff, but proceeds upon the idea of an independent appropriation of it by these parties, without further right to it than should accrue to them, or one of them, upon its being voted. It involves, if carried out, a palpable invasion of the soldiers' rights, and perversion of the objects of those who should vote the bounty. Both because the contract is against public policy, and because the subject-matter of it is not capable of being assigned, nor made the subject of an agreement to assign, no cause of action was shown against the defendant.

In the language of Judge COWEN, in *Munsell v. Lewis* (*supra*), "A simple expectancy in which the assignor has no interest and which is unpurchasable, can neither be assigned nor could a contract for future assignment, be valid. A mere *jus precarium*, a right resting in courtesy, is no more a matter of bargain than the virtue from which it emanates."

The order appealed from should be reversed, and a new trial in the County Court granted, with costs to abide the event.

In March, 1869, at the trial of the cause in the County Court, an order was made, allowing the plaintiff to amend the complaint, by inserting "such averments as are necessary to support the proof that the plaintiff, before the commencement of this action, purchased and took an assignment of the bounty money."

The General Term, in July, 1869, reversed this order.

In September, 1870, the case was again tried in the County Court, and a verdict rendered for the plaintiff, for \$138.50.

In November, 1871, the General Term reversed the judgment and ordered a new trial, on the ground that there was no privity of contract shown between the plaintiff or his assignee and the defendant, as to the money received by the defendant from the town.

In March, 1872, the case was again tried, and a verdict rendered for the plaintiff, for \$148.42.

At this trial, the plaintiff put in evidence a written assignment from West, of his claim to the bounty, and also introduced evidence

to show that defendant "agreed that if he drew any of the money that the substitute would be entitled to, he would pay it over."

The original defendant, John Saltsman, died March 8, 1872, and, in July, 1872, an order was made continuing the action in the name and on behalf of the present defendants, administrators of John Saltsman, deceased.

M. M. Waters, for the appellant.

Ballard & Warren, for the respondent.

BOCKES, J. :

This action originated in Justice's Court, and came into the County Court of Cortland county, by appeal, in which latter court it has been three times tried. It appears from the opinion of Mr. Justice PARKER, that a new trial was granted after the first trial in the County Court, on the ground that the plaintiff showed no right or title to the money claimed by him in the action. He held, first, that there was no privity of contract shown between the parties; second, that the claim, at the time of the alleged agreement with the defendant, was no more than a mere contingent possibility, not coupled with an interest, and hence was incapable of being sold and transferred; and third, that the alleged agreement between the parties, was against public policy, and void. This opinion was adopted by the court and became the law of the case, as applicable to the facts proved on the first trial; and, doubtless, it controlled the decision after the second trial. To the decision of the court thus pronounced, at two General Terms, we owe respectful obedience.

Unless, therefore, the case now before us, is different from that considered by Mr. Justice PARKER, in his opinion, we must abide by the conclusions there declared. The only difference claimed to exist between the case now before us, and that formerly before the court, is this: that an assignment of the claim is now proved, from West to the plaintiff. On the former trial (the first one) this transfer was not shown; and it is supposed by the plaintiff's counsel, that this evidence relieves the case from the difficulties in the way of a recovery, stated by Mr. Justice PARKER. But here arises a

question, raised by the objection to this evidence. The complaint is, simply, for money had and received by the defendant to plaintiff's use. There is no allegation, in the complaint, that the claim originally belonged to West, and that he sold and transferred it to the plaintiff. The plaintiff does not claim, in the complaint, as the assignee of West. If he claimed as the assignee of West, he should have alleged a cause of action by West against the defendant, and a transfer thereof by West to himself. The complaint contains no such averments, but is a simple complaint for money had and received. Under the complaint, it was not competent for the plaintiff to make a case as assignee, through a sale and transfer from West to himself, of the cause of action.

Were this a mere variance between the pleading and the proof, an amendment might have been allowed in the court below, and might, doubtless, yet be allowed by this court on the appeal, to meet and answer the objection. But it is more than a mere variance between the pleading and the proof. The evidence tended to show an independent and different cause of action from that stated in the complaint; a cause of action in favor of West assigned to the plaintiff; not a cause of action in favor of the plaintiff for money had and received to his use.* The objection was distinctly taken, that the evidence was inadmissible under the complaint. There was no averment that the plaintiff claimed the money as assignee, and the evidence of the assignment by West to him, was improperly received.

Nor can its introduction be deemed immaterial and harmless. The judge laid great stress on this evidence in his charge to the jury; indeed, he gave the jury to understand, that without evidence of a transfer of the claim by West, to the plaintiff, there could be no recovery. It seems very plain, that on the complaint which presents a claim merely "*for money which defendant had of plaintiff for defendant's own use*" (this is the language of the pleading), the plaintiff cannot be allowed to recover on an assigned demand. The recovery on a claim, assigned by West to the plaintiff, was unauthorized in this case. This difficulty stands directly in the way of a recovery in this action, if it be necessary to show a transfer of the claim from West to the plaintiff. This position presup-

* 30 Barb., 389; 18 How., 506, on p. 508.

poses that West, the substitute, was entitled to the bounty money, \$100 of which, the defendant had obtained. So this court held. Judge PARKER says: "No one but West, the substitute, or his assignee, was entitled to it. One hundred dollars of this bounty, thus belonging to West, the defendant obtained from the town authorities." It follows, therefore, that the plaintiff must base his action on a transfer of the claim from West to himself. This, he omitted to do. No such right of action is stated or suggested in the complaint.

We are cited to the case of *Barber v. Marble*,* as an authority in favor of allowing an amendment to meet the difficulty above considered. That case differs from this in many of its facts; one of which is (and this is a very important one), that *the case* as made on the evidence, was substantially embraced within the issues presented by the pleadings. In this view, of course, an amendment was properly allowed to conform the pleading to the facts proved. It was not introducing a new and different cause of action. And, here again we are met by the former decision of this court, in this case, reviewing an order of the county court, which allowed the precise amendment now desired. That decision, made at a recent term of this court, in this case, must now be observed. On what ground that decision was made, we are uninformed, as no opinion was written; but we must, I think, infer that the order was reversed on the ground that an amendment of the complaint, setting up a new cause of action, was improper at that stage of the case.

Second. But according to the opinion of Mr. Justice PARKER, which, having been adopted by this court, as above stated, must now be accepted as the law of this case, there are other reasons why the plaintiff cannot recover in this action. It was decided in this case on the former appeal, that the plaintiff could not recover on the agreement made between the plaintiff and defendant, to the effect that the former should have all the bounty moneys to which West, the substitute, should be entitled. Mr. Justice PARKER says: "Granting that the terms and intent of the agreement between the parties, included this among the bounties which the defendant agreed the plaintiff should have, the question arises, what is the effect of

*2 N. Y. S. C. Rep., 114.

such agreement, in regard to the bounty in question?" He then proceeds to consider this question at length, and comes to the conclusion stated in the former part of this opinion, to wit: that the claim at the time of the alleged agreement, was a mere contingent possibility, not coupled with an interest, and hence was incapable of being sold; also, that the alleged agreement was against public policy, and void. Those conclusions we do not now propose to re-examine, inasmuch as they have already received the sanction of this court at two General Terms. Even were we disposed to question the soundness of these conclusions, the concurrence in opinion by those learned judges who then composed the court, should stand as against our own on this subsequent presentation of the same case. It should be added here, that some of the views of the court, as expressed in the opinion of Mr. Justice PARKER, are supported by the more recent decision in *Butterworth v. Gould*,* and in *Osby v. Conant*.†

It seems, therefore, that the plaintiff failed to establish a cause of action, and the County Court should have directed judgment for the defendant.

Judgment reversed, new trial ordered, costs to abide the event.

MILLER, P. J., and BOARDMAN, J., concurred.

Judgment reversed, new trial ordered, costs to abide the event.

* 41 N. Y., 450.

† 5 Lans., 310.

MEMORANDA
OF
CASES NOT REPORTED IN FULL.

STEPHEN B. BARTEAU, EXECUTOR, ETC., OF JOSEPH E.
ALTHOUSE, DECEASED, RESPONDENT, v. THE PHOENIX
MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

*Policy of insurance — Warrants — False statements — Answers of assured — how
construed.*

This action was brought upon a policy of insurance, issued by the defendant upon the life of plaintiff's testator. The policy was issued July 29th, 1887, and Althouse died June 14th, 1888, of paralysis. In the application for insurance, signed by Althouse, it was declared that his answers to the questions thereby propounded to him, were fair and true; and that any untrue or fraudulent answers or suppressions of fact, should render the policy null and void. Among the questions put to him was this: "Whether he ever had paralysis?" to which he answered, "No." *Held*, reversing a judgment in favor of plaintiff, entered upon the verdict of a jury, that, as the evidence in the case proved that, previous to the issuing of the policy, he had had two attacks of paralysis, both of which were, in point of fact, of a seriously alarming character, and were so considered by his physician, his neighbors and himself, this statement in the application was manifestly untrue; that the policy issued upon this application, containing this false statement, was void, and the plaintiff was not entitled to recover.

The statement in the application should be interpreted with fairness to the assured. If, in fact, he never had more than a temporary illness or ailment, merely indicating the disease in some of its symptoms, but of no pronounced type, his answer should be received and construed with reference to that state of facts. So it is a fair rule of interpretation, that the inquiries put to the applicant for life insurance, are deemed to relate "to matters which affect the general health and the continuance of life," and not to "temporary and occasional physical disturbances, the result of accidental causes, to which all men are more or less subject."*

These are not supposed to be in the minds of the parties.

On the other hand, when the party is interrogated in regard to a disease of well-marked symptoms, alarming in character, which all well-informed persons

* MS. opinion of ALLEN, J., in Higbie, Ex'r., v. Ger. Mu. L. Ins. Co., reported in Memoranda, 53 N. Y., 608.

regard as affecting the general health, and as threatening the continuance of life from the danger of its recurrence, he is bound to speak and to state the exact truth.

APPEAL from a judgment entered in favor of the plaintiff, upon the verdict of a jury, and from an order denying a motion for a new trial made on the judge's minutes, and from an order denying a motion for a new trial, made on the ground of newly-discovered evidence.

The order denying a motion for a new trial, on the ground of newly-discovered evidence, was affirmed, on the ground that the evidence was wholly cumulative, and also because, if due diligence had been used, the evidence could have been discovered and produced upon the trial.

H. W. McClellan, for the appellant.

R. E. Andrews and John Cadman, for the respondent.

Opinion by BOOKES, J.

MILLER, P. J., and BOARDMAN, J., concurred.

Judgment reversed and new trial ordered, costs to abide the event. The order denying motion for new trial, on the ground of newly-discovered evidence, affirmed, with costs.

WILLIAM H. DARROW, RESPONDENT, v. HARVEY
NORTHROP, APPELLANT.

*Agency — Letter of witness — inconsistent with his testimony — admissible in evidence —
Silence — evidence of truth of facts stated.*

Plaintiff sued defendant, claiming to have sold him a quantity of hops. The defendant alleged that he bought the hops as agent of H. & C., of N. Y.; that plaintiff knew he was such agent; that the hops were shipped to H. & C. with plaintiff's knowledge and assent, and were sold by them, and that, subsequently, they failed without having paid for them. The referee found that the sale was made to the defendant as principal and not as agent of H. & C. *Held*, that the evidence in the case was sufficient to authorize the referee so to find.

A letter was written by the defendant to a third person, containing declarations touching the relations existing between himself, and the plaintiff as to the hops in

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suit, which were inconsistent with his testimony given upon the trial. *Held*, that the letter was properly received in evidence on the trial.

After the sale of the hops by H. & C., the defendant inclosed an account of the sale to plaintiff, and disclaimed any personal responsibilities for the proceeds, telling plaintiff he must look to H. & C. for his pay, as he, defendant, acted only as their agent; to this letter plaintiff paid no attention. On the trial, it was claimed that the plaintiff thereby ratified and acquiesced in the claim of the defendant, who was thereby released from any liability to plaintiff. *Held*, that the mere statement of the proposition would seem to be its sufficient refutation. It is not possible that one can release himself from the obligation of a valid contract, by telling the other party that he must look to some third person for its fulfillment, or that the contract was one of agency and not made by him as principal. The silence of plaintiff might be construed as some evidence of the truth of the facts stated, but by no possibility could it convert a principal into an agent, upon the theory of ratification, acquiescence or estoppel.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

H. Barclay, for the appellant.

N. Foote, for the respondent.

Opinion by BOARDMAN, J.

Present — MILLER, P. J., BOCKES and BOARDMAN, JJ.

Judgment affirmed, with costs.

JOHN A. VAN ETTEN, RESPONDENT, v. ONA TROUDDEN
AND ANOTHER, APPELLANTS.

Note — collateral security to — when extends time of payment of — Error — when not ground for new trial.

This action was brought against the defendants, as maker and indorser of a promissory note. The answer set up payment, that the plaintiff had accepted a third party (the firm of J. A. Charlton & Co.) as principal debtor for the note, and extended the time of payment with such third party, without defendants' consent or knowledge. The plaintiff received from the firm of Charlton & Co., a post-dated check, and, subsequently, a note for the amount of the note in suit, but the jury found that they were received as collateral security only, and that plaintiff did not accept the firm as principal debtor.

At the trial, the court charged that "the mere giving or taking of a check or

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note by a third party, as collateral, does not of itself extend the time of the principal debtor." *Held*, that the charge, as applicable to the case, was correct.*

The defendant's counsel requested the court to charge the jury, that if they should find that the plaintiff agreed to accept the firm of Charlton & Co. for the payment of the note in suit, that firm having the defendant Troudden's money to that amount, such agreement was a payment of the note, and the court refused so to charge. *Held*, that it erred in so doing; that though the agreement, if made, would not have been technically a payment, yet it would have discharged the debt by way of accord and satisfaction; † but that, as it appeared that the question whether or not such an agreement had been made, had been fairly presented to the jury in the charge of the judge, and they had answered it in the negative, that the judgment would not be reversed.

MOTION for a new trial upon a case and exceptions, ordered to be heard in the first instance at the General Term, and an appeal from an order denying a motion for a new trial, made upon the judge's minutes.

J. E. Van Etten, for the respondent.

A. Schoor-maker, for the appellants.

Opinion by BOOKES, J.

Present—MILLER, P. J., BOOKES and BOARDMAN, JJ.

Order affirmed and judgment ordered for plaintiff, with costs.

JULIA ANN FREEMAN, APPELLANT, v. ALBERT BARBER,
RESPONDENT.

Land owned by husband and wife—action for damages to—both must join—Remittitur.

Plaintiff brought this action to recover for the occupation of certain land, and for waste committed thereon. Upon the trial, it appeared that the title to the land was in the husband and wife, jointly. *Held*, that she could not recover; that both must join in the action. ‡

In an action heretofore brought, in this court, in which the plaintiff and her

* *Cary v. White*, 52 N. Y., 138.

† *Davis v. Spencer*, 24 N. Y., 386, 391; *Pratt v. Foote*, 9 Id., 463.

‡ *Farmers' and Mechanics' Bank v. Gregory, et al.*, 49 Barb., 135; *Goelet v. Gori*, 31 Barb., 314; *Torrey v. Torrey*, 14 N. Y., 430.

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husband were defendants, it was decided at the General Term,* reversing the judgment of a referee, that they were entitled to a life estate in the land, for damages to which, this action was brought, and to a deed conveying the same to her and her husband, to have and to hold the same so long as they, or either of them, should live. This judgment was affirmed in the Court of Appeals,† and judgment absolute ordered for the defendants; on filing the remittitur, an order was made at the Special Term directing the land to be conveyed to Julia Ann Freeman, the plaintiff, for her natural life. *Held*, that in so far as this order directed her to receive a greater or different interest than that authorized by the judgment of the General Term, it was of no effect, and not binding on the parties.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

H. Ballard and H. C. Minor, for the appellant.

M. M. Waters, for the respondent.

Opinion by MILLER, P. J.

Present—MILLER, P. J., BOOKES and BOARDMAN, JJ.

Judgment affirmed, with costs.

JAMES VAN BUREN, RESPONDENT, v. RICHARD STOKES
AND ANOTHER, APPELLANTS.

Promissory note — usury.

This action was brought upon a promissory note. The answers set up usury as a defense. The note was made by the defendant, Stokes, to raise money upon. The bank having refused to discount it, he applied to one Hill, who offered to discount it for a shave of six dollars, to which the defendant agreed. Hill then took the note and soon returned with plaintiff's check for the amount of the note, less legal discount, payable to the order of Stokes, who took the check to the bank, received the money, and paid Hill the six dollars according to agreement. Plaintiff had no knowledge that Hill received or was to receive anything from Stokes, nor did plaintiff receive or agree to receive the six dollars, or any part thereof. *Held*, that the plaintiff was entitled to recover.

The cases of *Elmer v. Oakley*,* *Condit v. Baldwin*,† and *Bell v. Day*,‡ followed.

* *Freeman v. Freeman*, 51 Barb., 312. † *Freeman v. Freeman*, 43 N. Y., 35

* 3 Lans., 34.

† 21 N. Y., 219.

‡ 23 N. Y., 165.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

J. V. V. Kenyon, for the appellants:

D. E. Keyser, and A. Schoonmaker, Jr., for the respondent

Opinion by BOARDMAN, J.

Present—MILLER, P. J., BOOKES and BOARDMAN, JJ..

Judgment affirmed, with costs.

BYRON MARKS, RESPONDENT, v. HIRAM I. KING, APPELLANT.

Witness—what evidence allowed to impair his statement.

This action was brought against the defendant, as indorser of a promissory note. The defense was, that the indorsement was a forgery. At the trial, the defendant offered to prove that a witness, called by the plaintiff, had been instrumental in getting one Bell indicted for the forgery of the note in suit, claiming that such evidence was admissible on the ground, that, if he was so instrumental, it militated against and impaired his opinion, previously given in evidence, that the indorsement was genuine. *Held*, that the evidence was properly excluded. He might have doubted whether the defendant would swear before the grand jury that the indorsement was not his, and might have desired to put him to the test of his oath; and, with a view to try the defendant's sincerity, in his assertion that his name on the note was a forgery, he might have aided in procuring his attendance before the grand jury, and thus have been, in fact, instrumental in obtaining the indictment, notwithstanding his settled conviction and full belief that the indorsement was genuine.

MOTION for a new trial on a case and exceptions ordered to be heard in the first instance at the General Term. In addition to what is stated above, the General Term examined and approved the action of the court below, in receiving in evidence certain drafts and checks; but its decision was based entirely upon the

facts of the case, and it is not considered of sufficient general interest to justify its publication.

G. W. Hotchkiss, for the respondent.

Chapman & Martin, for the appellant.

Opinion by BOOKES, J.

MILLER, P. J., and BOARDMAN, J., concurred.

Judgment ordered for plaintiff.

JAMES KERSLAKE, RESPONDENT, v. CYRUS SCHOON-
MAKER, APPELLANT.

Agent — liability of principal for acts of, after termination of agency — Refers — power of, to receive evidence and reserve his decisions as to objections to.

In this action, brought for goods sold and delivered, it appeared that one Boyce had, for a long time, acted as the agent of defendant in carrying on the lumber business, and that, after the termination of his agency, the plaintiff, who had received no notice that he had ceased to be defendant's agent, sold the lumber to him for the purchase-price of which this suit was brought. *Held*, that defendant was liable.

At the trial, evidence objected to by the defendant, was received by the referee, subject to his retaining or rejecting it at the conclusion of the case. *Held*, that, as the evidence so received was competent, this decision could not operate injuriously, or in any way affect the defendant's rights; it must be considered the same as if the evidence had been admitted absolutely, which would have been entirely proper.

The decision of this question was not necessary for a proper disposition of the case of *Peck v. Yorks*,* and the cases therein cited and relied upon (*Chasman v. Merkel*,† *Brooks v. Christopher*,‡ *McKnight v. Dunlop*,§) do not sustain the rule laid down.

* 47 Barb., 181.

† 8 Bosw., 403.

‡ 5 Duer, 316.

§ 1 Seld., 557.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

Richard L. H. Finch, for the appellant.

Martin I. Townsend and George Day, for the respondent.

Opinion by MILLER, P. J.

Present—MILLER, P. J., BOOKES and BOARDMAN, JJ.

Judgment affirmed, with costs.

HENRY McGRATH, RESPONDENT, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, APPELLANT.

Stare decisis.

APPEAL from an order, denying defendant's motion for a new trial on the judge's minutes after verdict for plaintiff.

An appeal was taken in this case to the General Term, from a judgment rendered for plaintiff on a former trial, on the hearing of which appeal, the judgment was reversed, and a new trial was ordered, on the ground that the judge erred in his charge to the jury; the court holding, however, that the case was a proper one for the jury on the evidence.

On this appeal, the court held that the evidence was substantially the same as on the former trial; that the error on which the new trial had been granted before, did not exist in the case made on this appeal, and it having been decided on the former appeal, that, on the evidence, the case should be submitted to the jury, the court

would not review that question; and that the damages were not so large as to justify the court holding them to be excessive.

Matthew Hale, for the appellant.

Amasa J. Parker, for the respondent.

Opinion by BOOKES, J.

Present—MILLER, P. J., and BOOKES and BOARDMAN, JJ.

Order affirmed and judgment ordered for plaintiff on the verdict.

JOHN B. SLAWSON, RESPONDENT, v. THE ALBANY
RAILWAY, APPELLANT.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

This action was brought to recover the price of certain fare-boxes furnished by the plaintiff to the defendant. The defense was, that the boxes were furnished under a special agreement, which the plaintiff had failed to carry out. The referee found in favor of the plaintiff, and from the judgment entered upon his report, this appeal was taken. The General Term held that the evidence showed that the plaintiff had always been ready and willing to perform the contract on his part, and had been prevented from so doing by the acts and neglect of the defendant, and that the plaintiff was entitled to recover; and that the measure of damages adopted by the referee, viz., the contract-price of the boxes, was proper, and affirmed the judgment.

Matthew Hale, for the appellant.

Grenville Tremain, for the respondent.

Opinion by BOARDMAN J.

Present—MILLER, P. J., BOOKES and BOARDMAN, JJ.

Judgment affirmed, with costs.

FRANK S. ATWELL, ADMINISTRATOR, ETC., OF ISAIAH SCOTT,
DECEASED, RESPONDENT, v. CHARLES K. BROWN, SURVIVOR,
ETC., APPELLANT.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The defendant, upon this appeal, insisted that there was not sufficient evidence to sustain the findings of the referee. The General Term, after a review of the evidence, decided that the findings were authorized by the evidence, and that the judgment was right, and should be affirmed.

John B. Gale, for the appellant.

Mr. Christie, for the respondent.

Opinion by BOARDMAN, J.

Present—MILLER, P. J., BOOKES and BOARDMAN, JJ.

Judgment affirmed, with costs.

DANIEL DONOVAN AND JAMES SWEENEY, APPELLANTS,
v. CYRUS L. WOODRUFF, RESPONDENT.

APPEAL from a judgment of nonsuit, directed by the court. The General Term, after an examination of the evidence, was of opinion that the case should have been submitted to the jury.

John E. Van Etten, for the appellants.

M. Schoonmaker, for the respondent.

Opinion by BOOKES, J.

Present—MILLER, P. J., and BOOKES and BOARDMAN, JJ.

Judgment reversed, new trial ordered, costs to abide the event.

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Cases

DETERMINED IN THE

SECOND DEPARTMENT

AT

GENERAL TERM,

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OSCAR F. COMPTON, APPELLANT, *v.* LEANDER B. SHAW,
RESPONDENT.

Warehouseman — liability of, for charges on freight stored with him by common-carrier in case of unauthorized delivery of it by him to consignee.

A warehouseman, with whom freight, on which the charge for transportation is unpaid, is stored by a common-carrier, and who, without the knowledge or consent of the common-carrier, delivers the property to the consignee, is liable to the common-carrier for the amount of his charges.

APPEAL from a judgment, dismissing the complaint.

The plaintiff was a boat owner, and received, as a common-carrier, a quantity of grain, shipped from Fort Plain, and consigned to the Security Insurance Company of New York.

Part of the grain was delivered to the consignee, and the balance was stored by the plaintiff, in the warehouse of the defendant, the plaintiff, at the same time, taking a receipt therefor. Part of the plaintiff's freight and charges had not been paid.

The defendant subsequently delivered the grain to the brokers of the consignee, and this action was brought to recover \$482.50,

for which plaintiff claimed to have a lien on the grain, this sum being the amount of his freight and charges thereon.

C. D. Landon, for the appellant.

II. C. Place, for the respondent.

BARNARD, J.:

I think the court erred in nonsuiting the plaintiff. He had, as a common-carrier, transported a cargo of wheat from Fort Plain to the city of New York. The wheat was consigned to the Security Insurance Company. Part of the cargo was delivered to the consignee, and the plaintiff, being unable to obtain his freight and advances on the wheat, deposited the same in the defendant's warehouses, and took a receipt therefor from defendant, in his own name. This act was done with the distinct understanding between the plaintiff and one Buckout, who acted for the insurance company, that it was done to save plaintiff's lien upon the property. The defendant, without plaintiff's knowledge or consent, delivered the property to Hoyt & Co., who were brokers for the insurance company. The plaintiff only seeks to recover the value of his special interest in the property, being the amount of such freight and advance charges. I see no defense to his claim. He was in possession of the property, with a lien upon it, and having a right to retain the property therefor, as against the owner. By the delivery to the defendant, as warehouseman, and by the receipt he took, the plaintiff was still, in law, in the possession of the property; and the defendant, by delivery thereof to Hoyt, was guilty of a conversion, and must answer to plaintiff for his interest in the property.

The judgment should be reversed and a new trial granted, costs to abide the event.

Present—BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Judgment reversed and new trial granted, costs to abide the event.

CHARLOTTE E. BROWN, APPELLANT, v. HENRY BROWN,
RESPONDENT.

Absolute Divorces—when court has no power to open decrees of—Code, § 135, sub. 5.

The court has no power to open a decree, granting an absolute divorce, upon proof that defendant did not receive any copy summons or notice of publication, and upon affidavits showing a defense.

Section 135, subdivision 5, of the Code, deprives the court of this power.

APPEAL from an order, vacating a judgment in favor of the plaintiff, and allowing the defendant to answer and defend.

The facts appear in the opinion.

Charles W. Dayton, for the appellant.

H. C. Place, for the respondent.

BARNARD, J.:

This is an action for a divorce. The summons was served by publication. Shortly after the decree was entered, granting an absolute divorce in favor of plaintiff, the defendant, upon proof that he did not receive any copy summons by mail, or any notice of the publication thereof, and upon affidavits showing a defense, applied to the court for leave to answer, and the court made an order opening the judgment, and permitting defendant to defend; from this order the plaintiff appeals.

By section 135, subdivision 5, of the Code, it is provided that "the defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown at any time before judgment, *must* be allowed to defend the action; and, *except in an action for divorce*, may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just." This section deprives the court of the power to grant the order appealed from. In all actions, except for divorce, after judgment, the defendant may be allowed to defend, within one year after notice of the judgment, and within seven years after its rendition.

The legislature, doubtless, intended to provide for new relations under the judgment—another marriage and birth of children. The character of the person who should marry such divorced plaintiff, and the legitimacy of his or her children, born of such a marriage, are protected by this statute. This exception as to divorce, was not in the Code of 1848.* It was first inserted in 1849, and has never been altered since†

The order should be reversed, and the motion denied, without costs.

Present—BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Order reversed, and motion denied, without costs.

SOPHIA C. DAVIS, APPELLANT, v. WILLIAM DAVIS,
RESPONDENT.

Husband and Wife—The fact that they cannot live together in harmony, not ground of separation—Maintenance of wife—how secured—order for, when proper.

The fact that there is no possibility of a husband and wife living together in harmony, is not ground for a legal separation.

In such case the parties must be left to bear, as they may, the inconveniences and griefs resulting from their want of harmony and mutual quarreling.

By the provisions of the Revised Statutes,‡ the court is not authorized to take possession of the property of the husband through the medium of a receiver, in the first instance, but to require security for the payment of the allowance, and to sequester his property only in the event of his neglecting to give security, or upon his default after security has been given.

An order for the maintenance and support of the wife, under section 55,§ cannot be made, unless one of the three grounds upon which the statute authorizes a limited divorce, be established in the case.

Atheater v. Atheater (36 How. Pr., 431), followed.

APPEAL by the plaintiff, from a judgment denying a limited divorce, and cross appeal by defendant, from such portions of the judgment, as direct the appointment of a receiver and the allowance of temporary alimony.

* Section 114 Code, 1848.

‡ 2 R. S., 147, § 55.

† Code of 1849, section 135, subdivision 6.

§ 2 R. S., p. 147.

This action was brought by the plaintiff to obtain a limited divorce, on the ground of cruel and inhuman treatment. The answer denies such treatment, and alleges various acts on the part of the wife, showing her quarrelsome disposition and violent conduct.

Various acts of violence were testified to on both sides.

The referee, to whom it was referred to take proofs and report thereon, with his opinion, reported, that, on all occasions when violence was used by the defendant towards the person of the plaintiff, the same was provoked by the ill conduct of the plaintiff; that in the various conflicts between them, the plaintiff was the aggressor, and, when collision came, the plaintiff sought, rather than avoided it; that the defendant's conduct was harsh and unloving, but was so far justified and provoked, as to fall short of cruelty or inhumanity; and that, as matter of law, the complaint should be dismissed, without costs to either party.

The justice, at Special Term, held that, without interfering with the decision of the referee, there was no possibility of the parties' living together in harmony, and for this state of facts the defendant was largely to blame, and ordered that a receiver be appointed, to whom the defendant should pay \$3,000, to be invested by the receiver, and the interest paid to the plaintiff.

Smith & Stanbrough, for the appellant.

William Wickham, for the respondent.

TALCOTT, J.:

This suit was instituted to procure a separation, *a mensa et thoro*, on the ground of cruel and inhuman treatment by the defendant of the plaintiff, his wife, and upon the ground that the defendant's conduct had been such as to render it unsafe and improper for the plaintiff to cohabit with him.

By the consent of the parties, it was referred to a referee to hear the proofs and allegations of the parties, and to report thereon to the court, with his opinion. The referee heard the voluminous evidence, and reported the same to the Special Term, together with an elaborate examination thereof, and his conclusions or opinion thereon. The opinion of the referee was to the effect, that, whenever the

defendant had exhibited any violence toward the plaintiff, it had been provoked by her, she, herself, being the aggressor; and the referee negatived the existence of the cruel and inhuman treatment alleged, or such conduct on his part as would render it unsafe and improper for the plaintiff to cohabit with him, but expressed the opinion that the complaint should be dismissed. The justice, at the Special Term, does not reverse the decision of the referee on any question of fact, but seems to agree that the opinion of the referee is not to be disturbed upon the facts; but, instead of dismissing the complaint, the Special Term appointed a receiver, and directed the defendant to pay said receiver the sum of \$3,000, to be invested, and the income or interest to be applied to the support and maintenance of the plaintiff.

Under the provisions of the Revised Statutes, relative to limited divorces,* the court is authorized, although a decree for separation be not made, to make an order for the support and maintenance of the wife and her children, or any of them, by the husband, out of his property, as the nature of the case renders suitable and proper.

It seems, however, that this is to be done, not by taking possession, through the medium of a receiver, of the property of the husband, or any part of it, in the first instance, but to require security for the payment of the allowance; and to sequester the property of the husband, only, in the event of his neglecting or refusing to give the security, or upon the default of the husband and his surety, after the security is given.† The judgment in this case would seem, therefore, to be erroneous, even if a judgment for an allowance to the wife might be granted, under section 55. The legislature did not intend to authorize the court to seize, out of the bulk of a husband's property, in the first instance, a sum sufficient to produce the income, deemed a proper allowance for the wife, but only required him to secure the payment, permitting a sequestration of property, only, after a default. But there is a more fundamental difficulty, under the rule settled in this department, as to the construction of the said section 55. It was held by the General Term of this department, in *Atwater v. Atwater*,‡ that an order for the maintenance and support of the

* 2 R. S. 147, § 55.

† 2 R. S. 148, § 60.

‡ 30 How. Pr. 431; S. C. 53, Barb. 621.

wife, under section 55, cannot be made, unless one of the three grounds, upon which the statute authorizes a limited divorce, be established in the case.

Those grounds are, 1. The cruel and inhuman treatment, by the husband, of his wife. 2. Such conduct on the part of the husband, towards his wife, as may render it unsafe and improper for her to cohabit with him. 3. The abandonment of the wife by the husband, and his refusal or neglect to provide for her.

The difficulty in this case, under the rule laid down in *Atwater v. Atwater*, (*supra*) is that there is no finding or adjudication by either the referee or the justice at Special Term, that either of the three grounds, upon which a separation can be authorized, exists in the case. The only thing in the nature of a finding or adjudication, upon which the judgment for separate maintenance seems to be based, is a statement in what seems to be intended as an opinion of the justice at Special Term, where he says, after declining, apparently, to come to a conclusion adverse to that of the referee, as to the failure of proof of the facts necessary to warrant a divorce, *a mensa et thoro*: "But the whole case shows that whatever be the decision of this action, there is no possibility of the parties living together in harmony. Their disagreements have reached such a point that any expectation of peace between them would be unwarranted."

This is not one of the grounds for which a legal separation by the court is warranted, and, according to the decision referred to, where such a case alone exists, the parties must be left to bear, as they may, the inconveniences and griefs resulting from their want of harmony and mutual quarreling.

The plaintiff has also appealed from the decree, and claims that a divorce should be granted. It is sufficient to say, that the testimony before the referee, as to the circumstances which transpired at the various quarrels between the parties, (and which are alleged by the plaintiff, as the grounds and evidence upon which she asks a decree of divorce) is in the highest degree conflicting, and the case was determined by the referee, mainly on the different credibility of the witness.

As we must follow the case of *Atwater v. Atwater*, before cited, the judgment of the Special Term, appealed from, is reversed, and

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judgment is ordered, dismissing the complaint without costs, and without prejudice to any new suit, to be instituted by the plaintiff against the defendant for a limited divorce.

Present—BARNARD, P. J., TALCOTT and TAPPEN, JJ.

Judgment of Special Term reversed, and judgment ordered, dismissing the complaint, without costs, and without prejudice to a new suit for a limited divorce.

HENRY J. BAKER, RESPONDENT, v. WILLIAM S. SQUIER
AND OTHERS, APPELLANTS.

Custom of Trade — when allowed to explain contract — Genuineness of paper — what evidence of, admissible — Lost paper — what efforts to find, required to allow introduction of copy in evidence.

A usage of the trade in which a contract is made, may be shown to explain the meaning of a particular contract, but not to contradict its plain terms.

On the question of the genuineness of a certificate, evidence that a great number of such certificates had been received in the trade as genuine, is sufficient evidence upon which to allow the question to go to the jury.

On introduction of a copy of a paper in evidence, where the paper is of little value, less diligence is demanded in attempting to produce or find the original, because the circumstances aid the presumption of loss.

APPEAL from a judgment in favor of the plaintiff, entered upon a verdict directed by the court.

The facts appear in the opinion.

Winchester Britton, for the respondent.

George P. Andrews, for the appellants.

TALCOTT, J.:

This action was brought for a refusal to receive goods, sold to the defendants by a bought and sold note. The goods were described in the contract, as 225 tons "Kurtz forty-eight to fifty per cent carbonated soda-ash." The ash was to be shipped from Liverpool to New York, at the rate of twenty-five tons monthly, and each shipment was to be treated as a separate contract. The

vendors notified the plaintiff of the first shipment, stating, "the test is forty-eight per cent." The vendee refused to receive the property, upon the ground that the test was only forty-eight per cent, when the contract called for forty-eight to fifty per cent.

Thereupon the vendors tendered the soda-ash, with a certificate of the test, purporting to have been issued by one Hussan & Arrot, showing the test to be forty-eight. Evidence was given on the part of the plaintiff, tending to show an established and universal custom in the trade, by which the terms, used in the contract, were understood to mean, that the soda-ash was to be of the manufacture of one Kurtz, and was to possess at least forty-eight per cent of alkali, which was to be, according to the test of certain English chemists, recognized and known in the trade, whose certificates were attached to the invoices and received as evidence of the test; and that the test of forty-eight per cent was understood to satisfy the contract. Messrs. Husson & Arrot were chemists, known to the dealers in the article, and their certificate was recognized in the trade, as a compliance with such a contract.

The defendants received the residue of the soda-ash, which arrived at New York by seven different shipments, upon the certificates purporting to be those of Husson & Arrot. The soda-ash, embraced in the shipment in question, after having been duly tendered to the defendants, was sold by the vendors, after due notice to the defendants; and this action is brought to recover the difference between the contract-price and the price brought at the sale. The exceptions of the defendant, to which our attention is called, relate to the proof of the custom of the trade, and to the genuineness of Husson & Arrot's certificates.

We think the custom was properly admitted in evidence. A person, engaged in a particular trade, is presumed to be acquainted with the usages of that trade, and to contract with reference to them. And the usage of the trade in which the contract is made, may be shown, to explain the meaning of a particular contract, but not to contradict its plain terms. The figures, forty-eight to fifty per cent, convey no meaning to a person ignorant of the subject-matter of the contract, and of the usages of the trade in which it was made. And the evidence of the custom was to explain the meaning of those terms or figures, when used in such a contract,

and did not tend to vary the import of the contract, so far as its terms were expressed.*

The defendants also object, that the genuineness of the certificate of Husson & Arrot, was not proved. There is no evidence of any person, who had seen Husson & Arrot write, or had corresponded with them, but there was the evidence of several dealers in the trade, to which the contract related, to the effect that numerous of such certificates (as one witness says, thousands) had passed through their hands, and had been acted upon by them, and received in the trade, as genuine. This, we think, was sufficient evidence to go to the jury, on the subject of the genuineness of the certificate.† The only remaining question, made by the defendants, grows out of the fact that a copy of the certificate of Husson & Arrot, was used on the trial, instead of the original. It appears, however, that it was customary to attach these certificates to the invoice, or bill of sale, and thus they passed into the hands of the purchaser, and were not preserved by the seller; and the witnesses in this case, were unable to trace the certificate, and some evidence was given tending to show that it was probably lost or destroyed.

Where a paper is of but little value, less diligence is demanded in attempting to produce or find the original paper, because the circumstance aids the presumption of loss. In this case, it appeared that the article to which the certificate related, had been sold, and, presumptively, that the certificate went with the invoice; and from the time which had elapsed, the article to which it related, had probably gone into general consumption. We think, therefore, that the circumstances, together with the evidence given, afforded a sufficient presumption of the loss or destruction of the original certificate, and that it was beyond the reach of the plaintiff.

The judgment must be affirmed.

Present — BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Judgment affirmed.

* 1 Greenleaf's Ev., § 292.

† 1 Greenleaf's Ev., § 577; U. S. v. Kean, 1 McLean, 429; Burnham v. Ayer, 22 N. H., 182.

JOHN R. VERNAM, APPELLANT, v. SAMUEL HARRIS AND
CHARLES CROCKER, RESPONDENTS.

*Partnership—dissolution of—Acceptance by creditor of note of one member of—
effect of.*

The defendants, while engaged, as copartners, in the business of saloon-keeping, became indebted to the plaintiff for beer purchased from him. Subsequently, the partnership was dissolved, Harris selling out his interest to Crocker, who agreed to pay the firm debts. The plaintiff, with knowledge of the dissolution, accepted Crocker's note for the debt, upon the agreement that, if paid, it would cancel the debt, but, if not, that he should hold the firm for it. Crocker having failed to pay the debt, this suit was brought. *Held*, that the plaintiff, by accepting Crocker's note, did not discharge Harris from his liability for the firm debts; that Harris was liable to the plaintiff, as principal debtor, and not merely as surety of Crocker.*

Colgrove v. Tullman (2 Lana., 97) distinguished; *Smith v. Rogers* (17 John., 340) followed.

APPEAL from a judgment in favor of the defendant Harris, entered upon the report of a referee.

In 1871, while the defendants were partners, engaged in the saloon business, under the name of Harris & Crocker, they purchased of the firm of H. B. Ogden & Co. (which firm was composed of H. B. Ogden and the plaintiff), beer, to the amount of ninety-three dollars.

Before the commencement of this action, Ogden assigned his interest in this account to the plaintiff. On or about June 10, 1871, the defendants dissolved partnership, Harris assigning all his interest in the partnership property to Crocker, who agreed to pay all the firm debts.

On or about July 6, 1871, Crocker informed the plaintiff of this arrangement, and asked him if he would take his own (Crocker's) note for the firm debt, payable thirty days after date. The plaintiff agreed to take the note, and stated that, if it was paid, it would cancel the debt, but, if not paid, that he should hold the firm of Harris & Crocker for the said debt.

* See *Miller v. Thorn*, decided in Court of Appeals, 1874, reported 15 Abb. (N. S.), 371.

The note not being paid at maturity, the plaintiff brought this action.

Cassidy & Brown, for the appellant.

H. H. Hustis, for the respondents.

TAPPEN, J. :

The plaintiff brought this action to recover \$137, for a bill of lading sold to defendants. The answer avers the dissolution of the defendants' firm of Harris & Crocker, on the 10th of June, 1871; that Crocker paid the debt sued for, by cash and a note, which plaintiff accepted in settlement. At the trial, it appeared that the note in question was the note of Crocker only, made after the dissolution of defendants' firm, and accepted by plaintiff from Crocker. The plaintiff testified: "I told him I would take it, and, if paid, it would be in full; if not paid, I would hold the firm."

The note was not paid. Plaintiff produced it at the trial, and offered to return it. This testimony is corroborated by other witnesses, and no other testimony was offered, which established any other version of the affair. It appeared, by the testimony, that the plaintiff was apprised of the dissolution of defendants' firm, and that Crocker had assumed the debts. It further appeared, that both defendants, some time afterward, joined in a general assignment for the benefit of creditors.

The referee held that the agreement between the two defendants, made Harris, who defends this action, a surety as between them; that plaintiff, with knowledge of the fact of this agreement, by accepting Crocker's note and giving time, discharged Harris; and he ordered judgment in favor of plaintiff, as to Crocker, and against the plaintiff, as to Harris. The contrary rule was held in a similar case,* and it is said, in *Waydell v. Luer*,† that the taking of a note from one of two joint debtors, does not satisfy the debt, unless it be so agreed.‡

The rule, that a surety is discharged by the giving of time to the principal, may be conceded, without, however, its entering into the

* *Smith v. Rogers*, 17 John. R., 340.

† 8 Denio, 410.

‡ *Van Eps v. Dillaye*, 6 Barb., 252; *Bates v. Rosekrans*, 37 N. Y., 409.

determination of the case. The defendants, Harris & Crocker, were both principals. Harris sold out to Crocker, with an agreement that Crocker should pay the firm debts. Crocker attempted to pay the firm debts, by giving the plaintiff his note at thirty days, which note was not paid. The express condition, on which plaintiff took the note, is not disputed, and is, that the firm should be held, if the note was not paid. The original liability of Crocker & Harris for their debts, as partners, and their responsibility to creditors, continued after a dissolution of their partnership. How, then, is Harris exonerated?

Crocker said to the plaintiff: "I have agreed to pay the firm debts; will you take my note?" The plaintiff conditionally accepted the note at thirty days; hence, the referee has found that Harris was a surety; that plaintiff acted with knowledge thereof; and that the extension of time to pay the debt, operated to discharge Harris. The defendant relies on *Colgrove v. Tallman*,* but the only point decided by that case, is, that the note there sued on was actually paid. The distinction is taken, in *Bates v. Rosekrans* (above cited), between a security, taken as a present payment, and that taken as a provision for future payment. In that case, the defendant and one Bingham had jointly given their note to the plaintiff, and, upon its non-payment at maturity, the plaintiff took a new note from one of the defendants alone, retaining, however the note which had become dishonored.

While this case is not directly in point, as to the exact question involved, yet that question was the feature in *Smith v. Rogers*.†

A creditor of a dissolved firm, with knowledge of the dissolution, and that one partner had assumed the debts, accepted that partner's note; he became insolvent, and the creditor sued the firm for the original debt. "Held, that neither the acceptance by the plaintiff of the note of one partner, nor the indulgence shown him, amounted to a payment, or discharged the other partner, but that plaintiff was entitled to recover of both partners the balance due for the original debt, on delivering up the note to be canceled." "It was the duty of one partner to see that the other partner complied with the engagement made with him as to the payment of the debt; and the plaintiff, knowing of this arrangement, is not, on

* 2 Lansing, 97.

† Above cited from 17 Johns.

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SECOND DEPARTMENT, MAY TERM, 1874.

that account, to be considered in default, for omitting to call on one partner until the insolvency of the other partner, whose note plaintiff had taken."

A debt is not paid by a new promise, unless it be so stipulated. The note in suit was simply a further security, liquidating a book account. Harris himself had no knowledge that it was given by his former partner.

In *Cole v. Sackett*,* a firm dissolved; one partner assumed the debts, and the creditor took the note of the one partner and gave up the note of the firm. The note so taken being unpaid, the creditor sued the firm for the original debt, and the court, Cowen, J., held, that these facts constituted no defense; and various authorities are there cited to sustain these views.

The weight of authority, and the "reason for the law," appear to be in favor of plaintiff, and that defendant Harris, as an original debtor, is not exonerated from his liability, there being no agreement to that effect.

The judgment, as to Harris, should be reversed, and a new trial ordered, as to him, costs to abide the event.

Present — BARNARD, P. J., TALCOTT and TAPPEN, JJ.

Judgment reversed, and new trial ordered as to defendant Harris, costs to abide the event.

THE BOARD OF SUPERVISORS OF RICHMOND COUNTY, PLAINTIFF, v. JOHN H. VAN CLIEF, DEFENDANT.

Custom — In conflict with statute, cannot be proved — Voluntary payment — when fraudulently obtained, may be recovered back.

Evidence as to a custom of the board of supervisors to allow its members five dollars *per diem* for services on committees, or to prove what such services were worth, is not admissible in an action relating to such services. Section 8, of chapter 855, of the Laws of 1869, is conclusive as to their value.

Money fraudulently obtained by a supervisor, though voluntarily paid, may be recovered back.

Supervisors of Onondaga v. Briggs (3 Denio, 26) distinguished; *Richmond Co. v. Ellis*, followed.

* 1 Hill, 516.

THE action was brought to recover certain moneys which had been paid to the defendant, a supervisor of Richmond county, by the county treasurer, upon bills audited and allowed by the board of supervisors. On the trial, the court directed a verdict in favor of the plaintiff, for the amount received by the defendant for his services on various committees of the board of supervisors.

The complaint, as to the remaining counts, was dismissed.

Exceptions were taken, on behalf of both parties, to the rulings of the court, and it was ordered that the exceptions be heard, in the first instance, at General Term, and that judgment, meantime, be suspended.

Tompkins Westervelt, for the plaintiff.

S. F. Rawson, for the defendant.

TALCOTT, J.:

This is an action to recover from the defendant, certain moneys which he had received from the treasurer of Richmond county, upon bills against that county, which had been made out by him against the county for his services as supervisor of said county, and which had been audited and allowed by the board of supervisors, and paid by the county treasurer. The charges in these accounts, which were held to be invalid at the circuit, were charges for attendance at committee meetings, in addition to the charges for attendance at the general meetings of the board, and, for which attendance at committee meetings, the defendant had charged five dollars each; and charges for two trips to Albany, three days each, charged at eighteen dollars; and twenty-five days, negotiating bonds, for which the defendant had charged five dollars per day. These charges purported, according to the bills presented by the defendant, to be for services rendered by him, as supervisor; and no explanation, as to the character in which the services charged as trips to Albany and negotiating bonds, was given or offered, except that stated on the defendant's bills presented. By the act of 1869,* it is enacted, "that each supervisor, whose compensation is not specially provided for by law, shall be entitled to

* Chapter 855, § 8.

charge and receive three dollars per day for each full day's services during the sessions of the board, besides mileage, now allowed by law; but such supervisor shall not be entitled to receive any other compensation whatever, except as the same is specially provided for by law." As this case appeared at the circuit, these charges for attendance at committee meetings, and for attendance at Albany, and for negotiating bonds, were charges for the services of the defendant, as supervisor, over and above three dollars *per diem* for each day's full services during the session of the board; and it is not claimed by the counsel for the appellant, that compensation for such services is specially provided by law. The offer to prove that it had been the custom of the board to allow its members five dollars *per diem*, for services of its members on committees, was, of course, properly rejected. The act of 1869 was designed to abrogate and forbid all such customs in the future, where they had existed in the past. Neither was the offer to prove that the services were reasonably worth the prices charged, admissible. The act of the legislature is conclusive upon the subject, and does not allow supervisors to pay themselves out of the county funds, as upon a *quantum meruit*.

The charges in question, then, were not legal charges, in behalf of the defendant against the county. But they have been adjusted, allowed and voluntarily paid, and the general rule of law, in relation to moneys which have been voluntarily paid on a claim of right, and with full knowledge of the facts, is, that such moneys cannot be recovered back; and it was expressly held by the old Supreme Court, in the *Supervisors of Onondaga v. Briggs*,* that this principle applied with full force to the case of moneys which had been allowed and paid by a board of supervisors, notwithstanding the charges thus paid were not legal charges against the county. In this case, however, I am relieved from the consideration of this question, since it appears that the General Term of this department, in the case of *Richmond County v. Ellis*,† has held, that money paid, under such circumstances, to a member of the board of supervisors, may be recovered back. In the opinion delivered in that case, the principle intended to be laid down is thus stated:

"The supervisors of a county have a trust confided to them,

* 2 Denio, 26.

† MS.

involving a faithful care and control of the public funds in the county treasury; and the voting and payment of unlawful claims to themselves, or to any one of their number, is a breach of a high trust and duty, and the making up of such claim, and the taking the money therefor out of the county treasury, when such acts are established by the testimony, justify the allegations of fraud in the complaint."

The complaint, in the present case, in like manner, charges that the money of the county was, in like manner, fraudulently obtained; and this case seems to be fully covered by the case of *Richmond County v. Ellis*. The motion for a new trial is, therefore, denied, and judgment is ordered for the plaintiff on the verdict.

Present — BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Motion for new trial denied, and judgment ordered for plaintiff.

WILLIAM H. ADAMS, APPELLANT, v. JOHN IVES AND
OTHERS, RESPONDENTS.

Contract for public work — Sureties — Substitution of other than those mentioned in bid, after its acceptance — when not allowed.

Commissioners appointed to lay out, etc., a public highway, published notice that proposals for doing the work would be received, and that each estimate must be accompanied by the consent of two sureties, who should be satisfactory to the commissioners, that they would become bound for the faithful performance of the work. Plaintiff put in a bid, and named, as sureties, A. and B. This bid was accepted by the commissioners. The plaintiff then applied to the commissioners to substitute, in place of the surety "B.," one "D.," which, after making some inquiry as to "D.," the commissioners refused to consent to. After notice to plaintiff to execute the contract and bond with the sureties named in the bid, and that otherwise his bid would be considered as withdrawn, and after plaintiff's tendering "D." as surety in place of B., he not being able to obtain B's consent, the commissioners entered into a contract with other parties; whereupon the plaintiff commenced an action in equity to restrain the execution of such contract and any payment thereunder. *Held*, that the suit could not be maintained; that the doctrine that under a contract to take good security, or a good indorsed note, the obligee is bound to accept that which is in fact correct within the meaning of the contract, and cannot reject a tender

of performance from mere willfulness or whim, had no application to the case, the only contract here being to accept two specified parties, and not to take any responsible sureties.

APPEAL from a judgment dismissing the complaint.
The facts are fully stated in the opinion.

James R. Adams, for the appellant.

D. P. Barnard, for the respondents.

TALCOTT, J.:

The defendants, Ives, Wykoff, Van Sickeen and Palmer, were appointed by the Supreme Court, commissioners to lay out, open and grade Atlantic avenue, in the town of New Lots, Kings county, under an act of the legislature, passed in 1869,* which act was amended in 1870.† Under these acts, the commissioners, as such, were to enter upon the lands taken for the avenue, and cause the same to be properly regulated, graded, graveled, curbed, etc., in such manner and on such plans, as, in their judgment, should be necessary. The act contains no directions as to any manner in which they shall contract for the doing of the work, or for any advertisement for proposals. The commissioners, however, did, in November, 1870, publish a notice, to the effect that, for the space of two weeks, proposals would be received for the regulating, grading, curbing, guttering and preparing the avenue, according to certain plans and specifications to be seen at their office. The specifications referred to, contained the following provisions, to wit: "Each estimate must be accompanied by the consent, in writing, of two persons, with their respective place of business or residence, who shall be satisfactory to the commissioners, so that, should the contract be awarded to the persons making the bid, they will, on its being so awarded, become bound as sureties, each and severally, in the sum of \$10,000, to insure the faithful performance of the contract."

The plaintiff put in a bid, which, on the face of it, purported to be a bid for furnishing the materials for the work in question, and named, as his securities, "William Miles and Samuel G. Adams, both real estate owners in the town of New Lots."

* Sess. Laws of 1869, p. 404.

† Sess. Laws of 1870, vol. 2, p. 1434.

The bid of the plaintiff was accepted by the commissioners, but he failed to procure the assent of Mr. Miles to become one of his sureties. He applied to the commissioners for leave to substitute, in place of Mr. Miles, as one of his sureties, one Charles Devlin, of the city of New York. The commissioners, after having made some investigation regarding the character and responsibility of Devlin, refused to consent to the change. The plaintiff then gave notice that he was ready to execute the contract, and asked them to specify a time when it would be convenient for him to be present with his sureties. The commissioners thereupon notified the plaintiff that the contract was prepared and ready for execution at their office, and notified him to call at the office of the commissioners with "the sureties proposed by you, viz.: William Miles and Samuel G. Adams, and sign the contract and bond, on or before the 15th of March, 1871; otherwise, the commissioners will consider you as having withdrawn and abandoned your bid, and the commissioners will award the contract to some other party."

The plaintiff, being unable to procure Mr. Miles to become one of his sureties, tendered Mr. Devlin, as such surety, in place of Miles; and thereupon, after the time specified in their notification to the plaintiff had expired, the commissioners awarded the contract to the defendants, Moore and Sturges. The plaintiff thereupon commenced this suit in equity, to restrain the commissioners from awarding the contract to any other person, and from collecting any money from the town of New Lots, to pay for doing the work, and to restrain the supervisor of the town of New Lots from issuing the bonds of the town of New Lots to pay for the work, and to restrain Moore and Sturges from doing the work under the contract awarded to them. On the trial, the complaint was dismissed, upon the ground that the commissioners were not legally bound to accept of Mr. Devlin as a surety for the performance of the contract by the plaintiff, even though Devlin was sufficiently responsible. Without conceding that a suit in equity can be maintained in such a case, we think that the decision at the Special Term was clearly right, upon the ground on which it was then placed. The authorities relied upon by the plaintiff's counsel, to show that, where there is a contract to take "good security," or "a good indorsed note," or when words creating a similar obligation are used in a

contract, the obligee is bound to accept that which, in fact, comes within the meaning of the contract, and cannot reject a tender of performance from mere willfulness or whim, have no application to this case. This is not a question of the meaning of the terms of a contract, or what is a fair and reasonable compliance with it. The only contract made by the commissioners with the plaintiff, was to accept, as sureties, two certain, specified parties, and they made no contract to accept any responsible sureties who might be offered. The plaintiff took upon himself the risk of being able to procure the sureties specified by him, and there was no obligation, whatever, resting upon the commissioners to give the contract to the plaintiff, except that created by the express terms of the bid and acceptance. As the commissioners were under no legal obligation to the plaintiff, of course he cannot maintain an action against them, upon the ground that they were actuated by improper motives, in refusing to do that which they were not bound to do by their contract.

The judgment must be affirmed, with costs of the appeal.

Present — BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Judgment affirmed, with costs.

ELLEN O'REILLY, RESPONDENT, v. THE GUARDIAN
MUTUAL LIFE INS. CO., APPELLANT.

Policy of life insurance — Notice and proof of death — when waived — Premiums — where payable — Agent — authority of.

A policy of insurance was issued by the defendant upon the lives of the plaintiff and her husband, payable to the survivor. The plaintiff's husband died, May 15th, 1872. On June 3d, 1872, a letter was written by the plaintiff to the defendant, informing it of the death of her husband, which letter the defendant retained and never demanded any further notice or proof of death. *Held*, that by so doing the defendant waived any insufficiency or informality in the notice.

The clause in policies, providing for preliminary proofs, is intended to furnish reasonable notice to the company, and is to be expounded liberally in favor of the assured.

The policy, which was delivered in Rhode Island, by one Rockwell, an agent of the defendant, provided, that, in case the premiums should not be paid when

due, it should be forfeited and cease and determine. No place for the payment of the premiums was prescribed in it, and the agent, at the time of delivering it, said that he would come around regularly and collect them. He did call and collect the first two half-yearly premiums, but failed to call for the one payable January 7th, 1872, which the plaintiff was ready to pay, but did not send to the company in New York, because she was waiting for the agent to call for it. Rockwell ceased to be the agent of the company, in August, 1871, of which the plaintiff had no notice. The policy provided that "agents of the company are authorized to receive premiums when due * * * but not to make, alter or discharge contracts or waive forfeitures." *Held*, that the agent, acting as he was for a foreign insurance company, had an implied authority to direct the assured how, when and where, the premiums were to be paid, and that the company, having received the benefit of the collections thus made by him, and having never required the plaintiff to pay the premium in New York, was bound by his acts.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

Wm. Peet, for the appellant. The proof of death was insufficient. (*Bliss on Life Ins.*, 412; *Woodfin v. Asheville*, 1 Bigelow Life and Ac. R., 626; *Hincken v. The Mut. Ben. L. Ins. Co.*, 50 N. Y., 657; *Owen v. Farmers' Ins. Co.*, 57 Barb., 520; *Davis v. Niagara Ins. Co.*, 49 Me., 282; *Taylor v. Aetna Life Ins. Co.*, 13 Gray, 434; *Mason v. Harvey*, 8 Exch., 819.) Rockwell had no authority to make the arrangement as to the payment of premiums. (*Mechanics' Bk. v. N. Y. & N. H. R. R.*, 3 Kern., 632; *Robertson v. Ketchum*, 11 Barb., 655; *Clark v. Metropolitan Bank*, 3 Duer, 249; Story on Agency, §§ 442, 443; *Wall v. Home Ins. Co.*, 36 N. Y., 157; *Mayor v. Brooklyn Fire Ins. Co.*, 3 Abb. App. Dec., 251; *Bouton v. Am. Mut. Life Ins. Co.*, 25 Conn., 542.)

James Troy, for the respondent. The proof of death was sufficient; if not, any informality was waived. (*Miller v. Eagle Life and Health Ins. Co.*, 2 E. D. Smith, 269; *Walsh v. Washington Ins. Co.*, 32 N. Y., 442; *Talcot v. Marine Ins. Co.*, 2 John., 136.)

TAPPEN, J.:

The defendants issued a policy for \$5,000, upon the lives of plaintiff and her husband Michael, payable to the survivor, etc.

And the defendants' liability being questioned on the death of

Michael, this action was brought, which resulted in a judgment for the plaintiff. The questions presented on the appeal are, first, whether the plaintiff gave defendants sufficient notice and proof of death within the terms of the policy; and second, whether an omission to pay the last half-yearly premium, which accrued before the death of Michael, operated to forfeit the policy.

The policy contained a clause, providing for payment of the money in sixty days after due notice and proof of death, after deducting from the amount of the policy any indebtedness to the company, on account of premiums.

The plaintiff gave the defendants the following notice:

PROVIDENCE, *June 3d*, 1872.

The Guardian Mutual Life Insurance Company, New York:

I hereby inform you that my husband Michael O'Reilly, whose life was insured in your office by policy 22,016, died in this city, on the 15th of May last, after a short illness.

Yours, respectfully,

ELLEN O'REILLY.

The defendants were silent after receiving this notice. They retained it as notice, and did not claim from plaintiff any further notice or proof of death. The policy does not prescribe any form of proof, and the plaintiff would seem to have relied upon the paper as being sufficient "proof" of death, and as satisfactory to the company. The clause in policies, providing for preliminary proofs, is to be expounded liberally in favor of the assured.*

The object of preliminary proofs is to furnish reasonable information, and the clause has been liberally expounded.† The defendants might have required some other kind of proof of the death of Michael O'Reilly. They failed to do so, and must be held to have waived it.‡ The policy contained the following clause: "In case the premium shall not be paid to the company, on or before the time prescribed for the payment of the same, the policy shall thereupon be forfeited, and cease and determine."

* *Walsh v. Washington Ins. Co.*, 83 N. Y., 442; *Talcot v. Marine Ins. Co.*, 2 Johns., 136.

† 5 Johns., 317 and 11 Johns., 259.

‡ *Vos v. Robinson*, 9 Johns. R., 195.

The contract was made in Rhode Island, the defendants acting there by their agent, one Rockwell. No place for the payment of premiums is prescribed in the policy. At the time of effecting insurance, or of delivering the policy, the agent said that he would come around regularly and take up the premiums, and otherwise to the effect that he might sometimes be out west, "but you hold it till I come." He did call and collect the two half-yearly premiums, but did not call for the premium due January, 1872. The plaintiff was ready to pay, but did not send it to the company's office in New York, because she was waiting for Rockwell to call for it, as he had instructed her. At the foot of the policy is this clause: "Agents of the company are authorized to receive premiums when due, upon the receipt of an authorized officer of the company, but not to make, alter or discharge contracts or waive forfeitures." The defendants claim that the promise of their agent to call for the premiums, was a violation of this clause, and not binding on them, and not available to the plaintiff as a legal excuse for delay in payment of premiums. •

As the policy did not prescribe any place of payment, and was made in Rhode Island, and the company had no office there, and the plaintiff had been in the habit of waiting for, and paying the agent when he called, the company should have given the plaintiff notice of any change in their mode of doing business in this respect. •

It was shown on the trial that they revoked Rockwell's agency in August, 1871, but, although it was claimed that notice of such revocation had been sent to the plaintiff, the proof fails in that respect, and there is no proof that such notice was sent, as claimed, while the plaintiff testifies that she never received it.

The question is, whether the plaintiff shall be prejudiced by the act of the agent. He did say he would call for the premiums, and he did call regularly, up to a certain time. A custom of the company would seem to be thus established, and I doubt whether either the act or the language of the agent, is to be considered a modification of the contract according to its terms; and this conclusion is placed on two grounds: First, it is in harmony with the general features of the business of a foreign insurance corporation, that the premiums should be collected by its agent at the

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place of the making of the contract, and that the agent was, therefore, exercising an implied authority, in saying to the assured how and where he would collect them, or where they should be paid; and, secondly, the company is presumed to have had the benefit of collections thus made, for the period of a year or more. They never exacted of the plaintiff, that she should pay them the premiums in New York.*

The half-yearly premium of \$157, became due the 7th of January, 1872.

O'Reilly died 15th May, 1872. Rockwell's agency was discontinued in August, 1871. It was not proved that the plaintiff had notice of this discontinuance, or that any other agent was appointed to represent the company. The court left it to the jury to say whether the plaintiff was chargeable with laches, in not seeking out a person to pay the premium to; and if they found her negligent in this respect, after Rockwell's failure to call, then that the policy had lapsed, and she could not recover.† No exception was taken to the charge.

The jury found for the plaintiff. The exceptions to the testimony do not appear to be tenable. The judgment should be affirmed, with costs.

Present—TALOOTT and TAPPEN, JJ.

Judgment affirmed, with costs.

THE PEOPLE EX REL. HAWLEY D. CLAPP, APPELLANT,
v. LYMAN FISK AND OTHERS, RESPONDENTS.

Contempt—Mandamus—necessity of seal to writ of.

A mandamus having been ordered, requiring the National Trust Company to pay to the relator a certain sum out of a fund in its hands, the same was attempted to be issued without the seal of the court, and, in this form, was delivered to the secretary of the company. Another claimant upon the same fund, having obtained and subsequently served in due form a like mandamus, the same being duly sealed, the Trust Company paid, under the advice of counsel, the

* Bohner v. Williamsburgh Ins. Co. 35 N. Y., 783.

† Sheldon v. Fire Ins. Co., 26 N. Y., 460.

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sum required by the second mandamus, leaving insufficient moneys in its hands to meet the full amount of the relator's claim. *Held*, that the service of a writ of mandamus without a seal, is a nullity. *Held*, further, that the officers of the company, not having intended any contempt, but acting under legal advice, in pursuing what they thought their duty, may avail themselves of the mearest technical objection in proceedings against them for contempt.

THIS is an appeal from an order of the Special Term of Kings county, denying a motion to punish Darius R. Mangam, the president, and James Merrill, the secretary, of the National Trust Company, of the city of New York (one of the defendants), and Thomas L. Rushmore, as for a contempt, in disobeying the mandamus issued in this case.

James Emott, for the appellant.

J. H. V. Arnold, for National Trust Company.

Winchester Britton, for Rushmore.

TALCOTT, J.:

The mandamus, ordered in behalf of the relator, ordered the National Trust Company to pay to the relator, the sum of \$8,750, "out of the funds deposited by the commissioners," to lay out Mammoneck avenue, in the county of Westchester. The relator was one of the claimants upon the fund so deposited, to the amount specified in the order. But, it seems that the court, simultaneously with the ordering of the mandamus in behalf of the relator, had ordered two other writs of peremptory mandamus, one in favor of Spencer and Hitchcock, and another in favor of Mary A. Dingee, who were also claimants upon the fund so deposited, ordering the payment of specific amounts in each case, out of the moneys so deposited. The total amount, so ordered to be paid by the three writs of mandamus, was more than sufficient to exhaust the entire amount of the fund, so on deposit with the Trust Company. The company first paid the amount of the claim of Mary A. Dingee, by the consent of the relator in this case. It then paid the amount ordered to be paid by the mandamus in favor of Spencer and Hitchcock, and the balance of the fund, amounting to \$4,560.85, it has paid over to the relator. It appears that the Trust Company had and claimed no interest in the fund, but as mere

depositories; and it is shown by the affidavit of Mr. Nicholls, who appeared as the counsel for the Trust Company, on the return of the orders to show cause why a peremptory mandamus should not issue in each of the three cases, which were all returnable at the same time, that he then stated to the court in behalf of the Trust Company, that there were not sufficient funds in the hands of the Trust Company, to pay all the three claims. Why the whole amount claimed by each of the claimants, was ordered to be paid by the Trust Company, instead of a *pro rata* proportion, does not appear. Possibly, the orders were so entered, through inadvertence on the part of the clerk or the attorneys. At all events, the orders were made, that a mandamus issue in each case, requiring the Trust Company to pay to each of the three claimants, the full amount of the claim in each case. Yet it clearly appears that no more was intended to be required of the Trust Company, than the payment of the amount so on deposit with it. As the orders were, that the mandamus should require the payments to be made out of the moneys so on deposit with the Trust Company, the company not having paid the relator in full, he made this motion that the president and secretary be punished as for a contempt. It appears that the mandamus, in favor of the relator, was attempted to be issued without a seal of the court, and, in this form, was delivered to James Merrill, the secretary of the Trust Company, on the evening of the 2d day of September, 1872, on which day, all the orders for the three writs of mandamus were granted, but no demand for payment was then made. The writ in favor of Mary A. Dingee, was served the same evening, and the order and writ in favor of Spencer and Hitchcock, were served about nine o'clock the next morning. A peremptory demand having been made in behalf of Spencer and Hitchcock, with the service of the writ in their behalf, and their attorney claiming that the service of a writ without a seal, in behalf of the relator, was ineffectual, and objecting to the payment of the relator before Spencer and Hitchcock had been paid, the officers of the Trust Company advised with their counsel, and, being advised by him that under the circumstances they were bound to pay the amount specified in the writ in favor of Spencer and Hitchcock, no sealed writ of mandamus then having been served under the order direct-

ing the mandamus to issue in behalf of the relator, they did so. The insufficiency of the fund for the payment of all the claims in full, and the objection that the writ attempted to be served in behalf of the relator was without a seal, were communicated to the relator, who was present at the office of the Trust Company, and it was then agreed that the counsel for the Trust Company should take further time to consider the matter till one or two o'clock of the same day; with which arrangement, as stated by the officers of the Trust Company, all the parties, including the relator, appeared to be satisfied. It further appears that after further considering the matter, and taking additional advice, the counsel of the Trust Company did, between one and two o'clock of that day, advise the company that it was bound to pay the amount called for by the Spencer and Hitchcock writ, which it accordingly did, the amount thus paid being \$6,500. The affidavits of Merrill and Mangam show that the company stood indifferent between the claimants in the several writs, and acted, throughout, under the advice of counsel, and with the desire and intention to obey the mandates of the court, in such manner as they were required by law. No sealed writ of mandamus, in behalf of the relator, was ever served upon, or exhibited to, any of the parties now proceeded against, or to any officer of the company, until after the payment in pursuance of the mandate of the writ in behalf of Spencer and Hitchcock, and, so far as appears, no such writ was ever sealed, till after such payment.

The motion appealed from, was denied, upon the ground that the service of the writ, in behalf of the relator, without a seal, was a nullity.

We are of the opinion that the decision at the Special Term was correct.

A seal is necessary to a writ of mandamus.* By the judiciary act of 1847, section 57, it is provided that no process, signed by the attorney, solicitor or party by whom issued, *except such as shall be issued by special order of the court*, shall be deemed void or voidable, by reason of having no seal, or a wrong seal thereon. The same distinction between writs issued at the option of the party, and those which required special allowance, had previously existed as

* Bouvier's Law Dic., Writ; Burrill's Law Dic., Writ; 2 Crary's Prac. Sp. Pro., 68; 2 R. S., 277, § 8.

to the use of seals, which the clerks of the court were authorized to issue in blank. These could not be affixed to writs requiring allowance, but the latter must be specially sealed.* Thus, the legislature has seen fit to provide that a writ, specially authorized by the court, must be specially sealed, and it seems to follow, that such a writ, without any seal, is not sufficiently authenticated according to law, to be the basis of proceedings for contempt; and it is held that an officer, acting under a process, without a seal, which the law requires to be sealed, is a trespasser.† The proper mode of service of a writ of mandamus, where there are several defendants, is by showing the original writ under the seal of the court, and delivering a copy.‡ No such service was made in this case. The Court of Chancery has, it is true, held, in many instances, that the mere knowledge that an injunction has been issued by it, forbidding the doing of certain acts, is sufficient on which to found a proceeding for contempt against a party having such knowledge, and without a personal service of the writ under seal. But, so far as we understand, this stretch of power has not been adopted in the courts of law, and in reference to writs issued under the common law.

But, aside from these considerations, it seems quite manifest that no contempt of the court, or disobedience of its process, was intended. On the contrary, the officers of the company intended to obey the commands of the court. Those commands could not be literally complied with, and they acted upon careful legal advice in pursuing what they thought their duty; and, under such circumstances, the merest technical objection is available against a proceeding for contempt.

The return of the defendant Rushmore shows a compliance, on his part, with the mandate of the writ, and it does not appear that the relator has suffered anything by any delay in the signing of the check by Rushmore.

The order appealed from must be affirmed, with ten dollars costs.

Present — BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Order affirmed, with ten dollars costs.

* Graham's Pr., 120.

† Millett v. Baker, 42 Barb., 215, and cases cited.

‡ Tapping on Mandamus, 380; 2 Cray's Prac. Sp. Pro., 68.

ALEXANDER McCUE, RESPONDENT, v. THE TRIBUNE ASSOCIATION AND JOHN DOE, APPELLANTS.

Practice—Ex parte examination of witness before referee—right of adverse party to object to—Appearance of witness—when waiver of objection to regularity of papers.

A party cannot interfere to prevent the procuring of an *ex parte* affidavit by his adversary. Objection to the contents of the affidavit, or to the mode of procuring it, must be made when the affidavit is sought to be used. The witness having appeared, and having submitted to the examination without objection. *Held*, that it was afterward too late for him to initiate proceedings to set aside the order, on the ground of the insufficiency of the affidavit on which it was granted.

APPEAL from an order, denying a motion to vacate and set aside a prior order, appointing a referee to take the affidavit or deposition of William F. G. Shanks, and also directing the said Shanks to appear before said referee and make such affidavit or deposition.

This was an action of libel brought against the defendants, to recover damages for an article published in the New York Tribune.

The plaintiff, being informed that Shanks knew who was the author of the article complained of, with a view to discover the real name of the writer, and to make a motion to amend his papers by substituting such name for John Doe, obtained an order appointing a referee to take the affidavit of Shanks, to be used on the motion to amend, Shanks having previously refused to make an affidavit voluntarily.

The witness appeared before the referee and submitted to the examination, but refused to answer certain questions. Subsequently, the defendant and Shanks moved to vacate the order of reference, which motion was denied, and this appeal was taken.

Cornelius A. Runkle, for the defendant.

A. J. Dittenhoefer, for William F. G. Shanks. The plaintiff cannot compel the discovery of the name of a person, against whom he proposes to bring a suit for libel. (*Opdyke v. Marble*, 44 Barb., 64; 2 Story's Eq. Jur., § 1494.) The motion is, in effect, a discovery. No fact in controversy between the parties is sought. The plaintiff seeks to find out whom to sue.

Tracey, Catlin & Brodhead, for the plaintiff. Section 401 of the Code is appropriate. The order was *ex parte*. (*Erie Railway v. Champlain*, 35 How., 74; *Erie Railway v. Gould*, 14 Abb., N. S., 280; *Brooks v. Schultz*, 5 Robt., 657.) An *ex parte* order is not appealable. (*Savage v. Relyea*, 3 How., 276; *Lindsay v. Sherman*, 5 How., 308.) The defendant cannot object, until the affidavit is offered. (*Brooks v. Schultz*, 5 Robt., 659.) The witness has appeared and been examined, and he cannot now appeal. (*Erie Railway v. Champlain*, 35 How., 74; *Claflin v. Farmers' Bank*, 25 N. Y., 293.

TALCOTT, J.:

The motion to vacate the order, appears to have been made by the Tribune Association, as a defendant, and by the witness Shanks. The Tribune Association had no right to move to vacate the order for an *ex parte* examination of the plaintiff's witness. There is no mode by which a party can interfere to prevent the procuring of an *ex parte* affidavit by his adversary. The witness might voluntarily appear before the referee and make the affidavit, and, if so, he might waive any irregularity or want of power in the proceedings to procure his attendance.

The affidavit is *ex parte*, and may or may not be used in the case. If there is anything in the contents, or in the mode of procuring the affidavit, to which the defendant can lawfully object, his objection must be made when the affidavit is sought to be used against him.*

The witness Shanks also moved to vacate the order, and he appeals from the decision of the Special Term. It appeared, on the motion, that Mr. Shanks appeared before the referee, attended by counsel, at the time and place named in the subpoena served upon him, and then and there, without any objection to the validity or regularity of the subpoena, or the order under which it was issued, submitted to examination, which had been closed before any notice of any motion to vacate the order appointing the referee was given. We think it was too late for the witness, after having voluntarily appeared and submitted to examination, to take exception to the proceedings to procure his attendance for that purpose. The only

* *Brooks v. Schultz*, 5 Rob., 656.

interference with any right of the witness, which was attempted by the order which he moved to vacate, was in that portion of the order which directed him to appear for the purpose of the examination. Any objection to the order, on this account, was waived by his voluntary appearance, without objection. This precise point appears to have been decided in the case of *The Erie Railway v. Champlain*,* where it was held that, after the witness had appeared before a referee appointed under section 401, and submitted to a partial examination, it was too late to move to vacate the order appointing the referee, on the ground that the affidavit on which the order was made, did not present a case authorizing the granting of the order. This, though a Special Term decision, was, we think, in conformity to the rule in similar cases. There is no point, as to the propriety of any questions put to the witness, before us, and we intend to decide nothing on that subject, only the proposition, that, after a witness has appeared and submitted to an examination, without objection, before a referee appointed for that purpose, it is too late for him to initiate proceedings for the purpose of setting aside the order, on the ground of the insufficiency of the affidavit on which it was granted. The order appealed from is affirmed, with ten dollars costs.

Present — BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Order affirmed, with ten dollars costs.

HERVEY ROCKWELL, RESPONDENT, v. ALFRED
LAWRENCE, APPELLANT.

Evidence — Admissibility of award to prove ownership of goods, in an action to recover the price of them.

The defendant having bought certain hay of one Seymour, title to the same was claimed by plaintiff. The claims of plaintiff and Seymour were submitted to arbitration, and the title to the hay was awarded to plaintiff. *Held*, that the award was properly admitted in evidence, to establish title in the plaintiff, in an action brought by him against the defendant to recover the price of the hay.

* 35 How., 74.

APPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

This action was brought to recover the price of certain hay, sold to the defendant by one Seymour, who worked plaintiff's farm under an agreement, by which he was to have a certain share of the products. Title to the hay sold, was claimed by the plaintiff, and the claims of Seymour and plaintiff were submitted to arbitration. The arbitrators determined that plaintiff was the owner, and notice of the award was given to the defendant. The action was referred to a referee, who reported in favor of the plaintiff. Judgment was entered upon the report, and the defendant appealed from the same.

Mundy & Stout, for the respondent.

William F. Purdy, for the appellant.

BARNARD, J.:

The plaintiff and one Seymour made an agreement, by which Seymour agreed to work plaintiff's farm for one year from 1st April, 1865. Seymour was to have one-third of the products for his labor, and was to have one-third of the hay which should be left in the spring of 1866, after leaving as much, and as good hay, as he received from plaintiff at the commencement of the lease. Just before the termination of the year, in March, 1866, Seymour sold the hay to defendant. Plaintiff claimed the hay. Upon this state of facts, plaintiff and Seymour agreed to submit the question to two arbitrators; and these arbitrators determined that Seymour had had all he was entitled to, under the lease or agreement, and that plaintiff was entitled to collect the proceeds of sales, made by Seymour. The defendant was notified of this award. Upon the trial, the plaintiff offered in evidence, the award as between plaintiff and Seymour. The defendant objected to this award, as not binding him. The evidence was received; and this presents the only question raised on this appeal. I think the evidence was admissible. The plaintiff had proven his title to the hay. It was used on his farm. Seymour was to have one-third of what remained, after making good the old hay of the preceding year.

If he had produced a bill of sale of the hay from Seymour to him, it would have been evidence of title in plaintiff. The award was offered for the same purpose, and had the same effect. As between plaintiff and Seymour, plaintiff owned the hay. The award conclusively established this as against Seymour, and in favor of plaintiff. The defendant had no interest in the question of ownership, and could not have been made a party to the arbitration. He was simply to pay the true owner, and the award established that, as to the rival claimants.

The judgment should be affirmed, with costs.

Present—BARNARD, P. J., TALCOTT and TAPPEN, JJ.

Judgment affirmed, with costs.

IN THE MATTER OF THE PETITION OF VEEDER G. THOMAS,
ASSIGNEE, ETC., FOR THE DISTRIBUTION OF CERTAIN MONIES IN
THE HANDS OF THE COUNTY TREASURER OF KINGS COUNTY, ARISING
ON A SALE IN PARTITION.

Will—Sale of real estate under decree in partition suit—when proceeds will be considered as realty.

An interest in certain real estate was devised to one R. for life, with remainder over to her children. While the children were still infants, the real estate was sold under a decree in a suit for partition, instituted by one of the other tenants in common. *Held*, that the estate of the infants was not changed by the sale, and that their interest in the proceeds was to be regarded as realty, and not as personalty.

Distinction drawn between the effect of a sale under the provisions of a will and a sale had under a decree in partition.

APPEAL from an order affirming the report of a referee.

The facts appear in the opinion.

Edwin T. Rice, for the appellant.

Wm. Henry Anthon, for the respondent.

TAPPEN, J.:

Mrs. Haff died in the year 1832, seized of an undivided interest in real estate, and leaving a will, devising the income of the same

for life, to her daughter, Mrs. Ryder; the remainder over to Mrs. Ryder's children.

The executors were empowered, with Mrs. Ryder's consent, to be signified in writing, under seal, and attested by two or more witnesses, to sell any of the real estate, and to invest the proceeds in the purchase of other real estate, and on bond and mortgage; and Mrs. Ryder was to have the income produced by such property, so purchased, or that produced by the bonds and mortgages, in which the proceeds might be invested. It was further provided as follows: "From and immediately after the decease of my said daughter, the real estate so purchased and the moneys put out at interest on bond and mortgage, shall go to the children of my said daughter, share and share alike, and to their heirs, executors, administrators and assigns, forever."

The real estate was *not* sold under the power of sale; the consent in writing, to the executors, was not given. A partition suit was brought by Peter Conover and others, after Mrs. Haff's death, in which action her devisees were made parties. A decree was made in chancery, October 7, 1834, whereby the rights of the several parties were determined, and it was adjudged that the defendants (infants), Aletta Ryder, Anthony Ryder, Sarah Ryder, Margaret Ryder, and Catharine Ryder, were each seized, in fee, of one-tenth of certain of the estate, subject to the life-estate of their mother, Sarah Ryder. As to the other estate, set forth in the decree, they were each adjudged to be seized, in fee, of one-twentieth part, subject as aforesaid. The premises were sold and the proceeds brought into court, and subsequently invested from time to time, and finally came to the hands of the county treasurer, who now holds \$5,090, for the distribution whereof this proceeding is brought.

It appears that Mrs. Ryder was twice married, and died in November, 1858, leaving, by her first husband, the five children above named, and, by her second husband, Daniel Richards, two children, to wit, Elvira and Daniel Richards.

Elvira became the wife of Henry P. Bradley; she died intestate November 17, 1861, without issue or descendant, and leaving her husband surviving. He took administration of her estate, and, as husband and administrator, he assigned to the petitioner the share which he claimed to belong to Elvira, in the moneys aforesaid.

It is asserted by the petitioner, that the moneys, by and on the sale of the realty, became personalty, and that, as such, the husband of Elvira is entitled thereto.

On the tenth of October, 1859, the Supreme Court made an order, confirming the report of B. D. Silliman, referee, and setting forth that Elvira Richards was entitled, under the will of Mrs. Haff, to one-seventh of the fund then in court; such one-seventh, to wit, \$5,090, to be passed to the credit of Elvira, and the interest to be paid to her general guardian.

On the petition in the pending proceeding, a reference was ordered to George G. Reynolds, Esq., who reported thereon. The report was confirmed by order, May 21, 1869, and the fund awarded to the brothers and sisters, both of the whole and half blood of Elvira Bradley, as her heirs-at-law. The petitioner filed exceptions to the report, which exceptions were overruled, and he now brings this appeal.

It is to be observed that the fund arose from the sale of the realty, under a decree in partition, and that the sale was not made pursuant to any will, or by the surrogate's order for the payment of debts; * hence, the rule in *Kellett v. Rathbun*, † and kindred cases, that a sale, under the provisions of a will, converts the proceeds of realty into personalty, does not apply.

The disposition of the land of infants by means of a sale under the statute, or in partition, does not change the character of the estate; ‡ and this view of the law is repeated in *Horton v. McCoy*, § and in *Swoezy v. Thayer*.]

The controlling feature in the present case is this: the power of sale to the executors of Mrs. Haff, is not unqualified; it is made dependent on a written consent to be signed and sealed by her daughter, the life tenant, in the presence of two or more credible witnesses. This restriction upon the power of sale, with the non-exercise of that power, prevents the conversion of the realty into personalty, which has been argued to result from the mere force of an absolute power of sale contained in a will.

* 3 R. S. (3d ed.), 173.

† 4 Paige, 102.

‡ *Davison v. Defreest* 3 Sand. Ch. R., 456; 3 R. S., (5th ed.), 41.

§ 47 N. Y., 21.

| 1 Duer, 296

The order appealed from should be affirmed, with ten dollars costs.

Present—BARNARD, P. J., TALCOTT and TAPPEN, JJ.

Order affirmed, with ten dollars costs.

WALDO HUTCHINS AND ANOTHER, PLAINTIFFS, v. SARAH
M. G. MERRILL AND ANOTHER, EXECUTRIXES, ETC.

Will—Residuary legatees—no interest in the estate until prior legatees are paid.

The defendants' testator devised all his estate, both real and personal, to trustees, to apply certain portions of the rents, issues and profits thereof to the use of persons, named in his will, during the life of his wife; and directed that, upon her death, the residue of the estate should, after the payment of certain specific legacies, be divided between the plaintiffs' assignors. A portion of the rents being undisposed of by the will, the plaintiffs applied to have the accumulation paid over to them. *Held*, that they were not entitled to receive it; that it did not appear that upon the division of the estate and the payment of the specific legacies, there would be any residue to which the plaintiffs would be entitled.

A controversy submitted without action, pursuant to section 372 of the Code of Procedure, to obtain a judicial construction of portions of the last will of Eli Merrill, deceased.

The testator died, in 1855, seized of certain real estate, situated in New York and Brooklyn. By his will, he devised all his estate, both real and personal, to trustees, to apply the rents, profits and income thereof to certain purposes, therein specified, during the life of his wife, and directed that upon her death, all his estate, not therein otherwise disposed of, be sold, or be divided among certain persons, in the proportions thereafter specified, as a majority of his executors and pecuniary legatees might then agree or determine; and after the payment of these legacies, he devised the residue of his estate to his brothers, and certain nephews and nieces named in the will. A portion of the rents of the real estate being undisposed of by the will, the plaintiffs, who were the assignees of

the residuary legatees, claimed to be entitled to the accumulation in the hands of the defendants, and brought this action to recover it.

Waldo Hutchins, for the plaintiffs.

Edgar M. Cullen, for the respondents.

TAPPEN, J.:

This is a controversy submitted without action, for the determination of certain questions arising from the provisions of the will of Eli Merrill, deceased.

There is in the hands of the executrixes, an accumulation of surplus rents of realty, which accumulation the will does not in terms dispose of. It is now claimed on behalf of the plaintiffs, that these rents follow the disposition, made by the will, of the residuary estate, and that this residuary estate goes, on the death of the widow, to certain persons named in the will, and that they are entitled to immediate distribution of such rents. The widow is still living. After her death, the will provides that the estate shall be sold, or divided in the proportions hereinafter specified, as a majority of the executors and pecuniary legatees may then agree and determine; and such division of the estate or distribution of the proceeds to be made as follows:

- \$10,000, or the value thereof, to Eliza L. Thayer, a niece;
- 5,000, or the value thereof, to an adopted daughter;
- 5,000, or the value thereof, to a niece;
- 500, or the value thereof, to a niece; and
- 500, or the value thereof, to another niece.

An estate of the value of \$21,000, will therefore be required, on the death of the widow, to satisfy these provisions.

The undisposed residue or proceeds of the estate, are directed to be equally divided among such of the following named persons, as shall be living at the widow's death. These persons are Ira and John Merrill, brothers of the testator, and certain nephews and nieces, who are named; and they are now represented by the plaintiffs, who claim to be entitled to the surplus rents, by reason of certain conveyances by the residuary devisees, of the residuary estate, as set forth in the case agreed on. It will be seen that,

before the residuary devisees take anything, the estate must respond to the extent of \$21,000, in land or money, to satisfy the claims of the prior beneficiaries. The value of the estate is not stated. These prior beneficiaries are entitled to intervene between the surplus fund and the residuaries, and they have not been heard, nor are they represented in this case. The plaintiff's grantors or assignors, if presumptively entitled to the next eventual estate, on the death of the widow, under the provisions of the statute,* are postponed until satisfaction of the claims of the persons, called by the testator his pecuniary legatees.

It does not appear that any estate will reach the residuary devisees; but it is possible that all the estate will be required to meet the prior devises or bequests.

The facts, so far as placed before the court, do not justify judgment for the plaintiff, and, subject to further proceedings, judgment is ordered for the defendants.

BARNARD, P. J., and TALCOTT, J., concurred.

Judgment ordered for the defendants.

ABRAHAM HEWLETT, APPELLANT, v. SAMUEL WOOD
AND OTHERS, RESPONDENTS.

Partition—Chap. 238, 1853—Issues in the action—when to be tried by a jury.

The plaintiff brought this action, as heir-at-law of Abraham Wood, deceased, to obtain the partition of certain lands in the possession of the defendants, who claimed them as devisees of said Wood. The plaintiff alleged that the devise was void, and brought this action in pursuance of chapter 238, Laws 1853. A motion was made by the plaintiff, for an order directing the settlement of the issues in the action, and that the same be tried by a jury. *Held*, that it was error for the Special Term to deny the motion.

APPEAL from an order made by the Special Term of Kings county, denying a motion made by the plaintiff for the settlement of the issues in the action, and for their trial by a jury.

E. T. Schenck, for the appellant.

A. Wakeman, for the respondent.

* 1 R. S., Edmund's ed., p. 675, § 40.

TALOOTT, J.:

This was an action in form for a partition, but it appears that the real question in controversy is as to the validity of a devise made by Abraham Wood, who died seized of the property in question. The defendants are in possession of the property, claiming under the will sought to be impeached, and denying the title of the plaintiff as heir-at-law. In such a case, no decree for the partition could have been made before the act of 1853.* The act of 1853 † provides that heirs, claiming by descent from an ancestor who died in possession, whether they be in possession or not, notwithstanding any apparent devise, may prosecute an action for partition, notwithstanding any possession under the devise, provided they shall allege and establish in such action, that the apparent devise is void. Under this statute, the action is maintainable, notwithstanding the adverse possession of those claiming to be devisees. The case has been once before tried; a new trial has been ordered by the Court of Appeals; and it appears that the questions to be litigated, are as to the mental capacity of the testator, and whether or not the will in question was procured through undue influence, imposition and fraud, involving the examination of a large number of witnesses and conflicting testimony. Such questions, when they arose in a court of equity, were referred to a jury for trial. ‡ In an action in equity, before the Revised Statutes, when the legal title was in controversy, the practice of the court was to retain the suit, until the title could be established at law. § After the Revised Statutes, the practice was to dismiss the complaint without prejudice to a new suit, after the title had been established at law.*

The provisions of the Revised Statutes on the subject of partition, clearly contemplate, if they do not require, a trial by jury, where the legal title is in dispute; and section 448 of the Code applies the provisions of the Revised Statutes, relating to partition, to actions brought under the Code for the same purpose, so far as

* *Burhans v. Burhans*, 2 Barb. Ch., 898; *Florence v. Hopkins*, 46 N. Y., 183.

† *Sess. Laws of 1853*, p. 526.

‡ *Story's Eq. Jur.*, § 72.

§ *Wilkin v. Wilkin*, 1 Johns. Ch. R., 111; *Coxe v. Smith*, 4 J. C. R., 271.

|| 2 R. S., 219-20; §§ 16, 17, 18, 19 and 23.

the same can be so applied to the substance and subject-matter of the action, without regard to its form.

It is assumed that the action for partition under the Code, is an action in equity. Assuming this to be correct, and assuming that a court of equity had jurisdiction in such a case to decide upon and dispose of the legal title where that is in dispute, still, as we have seen, that court did not attempt to do so in such a case, without the intervention of a jury.* There is nothing in the act of 1853, before referred to, which undertakes to change the mode of trial in such cases. In fact, the action for a partition, under the act of 1853, is in the nature of an action of ejectment; the partition can only be granted as incidental relief, depending on the prior establishment of the legal title, which is the main point in controversy. The refusal to grant an issue in such a case, is good ground for an appeal.† The counsel for the respondent claims that no issue of fact is made by the pleadings. The plaintiff, following the language of the act of 1853, before referred to, alleges that the will, under which the defendants claim, is void. It is quite probable that this allegation, as a matter of pleading, is too general, and that the defendants might have compelled the plaintiff to make his complaint more specific in this respect. But if they saw fit to go to trial on this general allegation, they subjected themselves to the consequence, that any evidence, showing the will to be void, is admissible, and any embarrassment, arising from the generality of the allegation, can be remedied on the settlement of the issues.

On the whole, we think the Special Term erred, in refusing to settle issues, in the action, to be tried by a jury.

The order appealed from is reversed, and the issues of fact, touching the validity of the will of Abraham Wood, must be settled in the usual manner, and tried by a jury; ten dollars costs of the appeal to abide the event of the action.

Present — BARNARD, P. J., TALCOTT and TAPPEN, JJ.

Ordered accordingly.

* Willard's Eq. Jur., 704.

† Townsend v. Graves, 3 Paige, 487.

LOFTIS WOOD, PLAINTIFF, v. ALFRED C. SQUIRES,
DEFENDANT.

Contract for purchase of land—Assessments and assessment sales—when incumbrances—Effect of statute of limitations on lien of assessment.

Defendant agreed to purchase certain land of plaintiff, the deed to be delivered on the 3d day of January, 1874. At the time agreed upon, there were two assessments, which had been levied upon the premises, and confirmed by the trustees of the village of Williamsburgh, one in January, 1851, and the other in July, 1852, both of which stood upon the records unpaid and undischarged; the premises had also been twice sold for unpaid assessments, once in November, 1847, and again in October, 1851, both of which sales appeared on the records as unredeemed and uncanceled, but neither of the vendees had ever entered into the actual possession of the premises, or exercised control over the same. On account of these assessments and sales, defendant refused to complete the purchase. *Held*, that he was justified in so doing. That they were valid incumbrances on the premises, which the defendant was entitled to have discharged before he could be required to perform the contract on his part.

In the absence of any adverse possession, the possession follows the legal title.

CASE agreed upon and submitted without action, under section 372 of the Code. The facts are stated in the opinion.

Theodore T. Jackson, for the plaintiff.

Clement & Cooke, for the defendant.

TALCOTT, J.:

By the statement contained in this case, it appears that the parties, in December, 1873, entered into an agreement in writing, whereby said Wood agreed to sell, and said Squires to purchase, a certain lot of land on Humbolt street, in Brooklyn. Squires was to pay on said purchase, the sum of \$400, January 3d, 1874, and give his bond and mortgage for the balance of the purchase-money. On the said 3d day of January, 1874, Wood executed, acknowledged and tendered to Squires, a deed conveying the premises to Squires in fee, with covenants of warranty and against incumbrances, "and other usual full covenants," and demanded the payment of the \$400, and the execution of the bond and mortgage. In January, 1851, an assessment was levied upon the premises,

and confirmed by the trustees of the village of Williamsburgh, and, in July, 1852, another assessment was levied upon the same premises, and confirmed by the common council of the city of Williamsburgh. The first of said assessments was for fifty dollars, and the second was for sixty-nine dollars. These assessments, it is admitted, became, at their several dates, valid liens on the premises, and warrants were issued thereon to the collectors, the same returned uncollected, and the same stand upon the records unpaid and undischarged. No sale of said premises has ever taken place on either of said assessments.

On the 29th of November, 1847, the premises were duly sold by the trustees of the village of Williamsburgh, for an unpaid tax, to George W. Niles for the term of forty-five years, and a declaration of sale was duly issued to said Niles; and, in October, 1851, the premises were again sold by said trustees, for another unpaid tax, to George Ricard for 100 years, and a declaration of sale duly issued to Ricard. The sales appear on the records as unredeemed and uncanceled, but neither of the vendees has ever entered into the actual possession of the premises, or exercised control over the same.

Squires objects to complete his contract, because of the said outstanding assessments and the said sales. Wood, the vendor, insists that the liens of the assessments, on which no sale has been had, are barred by the presumption of payment arising from lapse of time, and that the claims of Niles and Ricard under the sales, are barred by the statute of limitations, more than twenty years having elapsed since the title of said purchasers accrued, without any steps taken to obtain possession. It is agreed that all the proceedings upon the assessments and sales in 1847 and 1851, were valid and effectual, and according to the provisions of law.

The question intended to be submitted to the court apparently is, whether the vendor is bound to clear away the apparent incumbrances and outstanding titles, before he can compel a performance of the contract on the part of the vendee.

As to the sales to Niles and Ricard, this seems to be quite plain. By section 49 of the act to condense and amend the several acts relating to the village of Williamsburgh, passed April 23d, 1844, the sales and declarations of sale, made in pursuance thereof, gave

the legal title to the purchaser from the time of the purchase. It does not appear from the case, that the statute of limitations can constitute any defense against the titles of Niles or Ricard, for it does not appear that the premises have been held adversely to their titles, at any time since such titles accrued. In fact it is not shown that the premises have ever been occupied at all. In the absence of an adverse possession, the possession follows the legal title, and section 78 of the Code, is to be read in connection with section 81.

The question as to the assessments upon which no sales have been made, is more embarrassing. Yet on the whole, the vendor, before he can compel the vendee to take the title, must clear away these assessments. The acts under which these assessments were levied, declare that the assessment shall be a lien from the time of confirmation. No period at which the lien will expire is fixed by the statute, nor is any time specified in the statute, after which the assessments shall be deemed discharged, or within which the proceedings provided for their collection shall be instituted. The statute creating an absolute presumption of payment after the lapse of twenty years, without part payment or a written acknowledgment has no application, otherwise than by analogy, to the case. It is by its terms confined to judgments rendered in courts of record and to rights of action accrued on a sealed instrument.* The general presumption of payment, applicable to stale demands, which exists independently of the statute, might doubtless be applied to such a case, and would doubtless apply with great force, as a question of fact and presumption, but nevertheless it is a question of fact.† Upon the principles which have been settled on this subject, we do not think the vendee is bound to take a title incumbered with this doubt.‡ In the case last cited, FOLGER, J., delivering the opinion of the court, says: "If there be any reasonable chance that some third person may raise a question against the owner of the estate after the completion of the contract the court considers this a circumstance which renders the bargain a hard one for the purchaser and one which it will not in the exercise of its discretion compel him to execute."

* 2 R. S., 301.

† Jackson v. Sackett, 7 Wend., 94.

‡ Morange v. Morris, 8 Keyes, 48; Brooklyn Park Commissioners v. Armstrong, 45 N. Y., 294.

For the purposes of this case, then, we answer the fourth question contained in the case submitted to us, that the said assessments and sales stated in the case submitted, are, and each of them is, a valid incumbrance on the premises described in the complaint, which the said defendant Squires is entitled to have discharged, before performing his contract.

Judgment to be entered according to the stipulation in the case.

Present — BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Judgment ordered accordingly.

ELIZABETH THOMPSON, RESPONDENT, v. JOSEPH
EGBERT, APPELLANT.

Partnership — title to lands of, taken in name of a partner — Equitable defenses — when allowed in a legal action.

This action was brought by the plaintiff as sole devisee of John C. Thompson, deceased, to recover certain lands in the possession of the defendant. The defendant alleged in his answer that the land was bought as partnership property by J. C. Thompson and defendant, and that the deed was taken in the name of J. C. Thompson, which was the firm name; that he had paid his share toward the purchase; that he was in possession as partner, and had expended a large amount in improving the land. At the trial, the justice excluded proof of these allegations; *held*, that this was error.

APPEAL from a judgment in favor of the plaintiff. The facts are stated in the opinion.

George P. Avery, for the appellant. It was necessary to show that appellant was in unlawful possession. (53 Barb., 155.) An equitable defense is legitimate, in an action of ejectment. (Code, § 150; *Carr v. Carr*, 52 N. Y., 251; *Fiedler v. Darrin*, 50 id., 438; *Ryan v. Dow*, 34 id., 307; *Murray v. Walker*, 31 id., 399; *Phillips v. Gorham*, 17 id., 270.) The statute of frauds does not apply. A partnership in lands may be proven by parol. (*Chester v. Dickerson*, 52 Barb., 349; *Hiscock v. Phelps*, 49 N. Y.,

98; *Garrett v. Schoeffer*, 47 id., 655; *Sage v. Sherman*, 2 id., 423.)

T. Westervelt, for the respondent.

BARNARD, J. :

The plaintiff is the widow of John C. Thompson, and sole devisee under his will, of all her husband's real estate. As such, she brings this action to dispossess the defendant from certain lands, which are situate in Richmond county, and which her husband took by deed from Abram Hallock.

The defendant, in his answer, set up as a defense, that the property was bought as partnership property, by John C. Thompson and defendant, as partners, and the deed was taken in the firm name, which was John C. Thompson. That the defendant had paid his share toward the purchase, and that he was in possession as partner, and had paid a large amount in the improvement of the land. Upon the trial, the justice excluded the proof offered by defendant, to show a partnership in the lands by parol, and also to establish the other averments contained in the answer. We think this erroneous.

It is well established now, that an equitable defense may be set up to a legal action. This is not questioned by the respondent.

His claim is that the defendant asks no affirmative relief, based upon his equitable claim. This is true, but if his answer is proven, he is not wrongfully in possession as against the plaintiff, and by reason thereof this action fails. Indeed, I do not see what equitable relief he could ask, as against the plaintiff. She was simply a devisee of her husband's lands. She had no interest beyond this property, in the partnership or its assets, or in its liabilities. She could bind no one by a litigation upon these questions. She alone brings this action, and when the defendant meets her claim, he does all that is required of him in the action.

The judgment should be reversed and a new trial granted, costs to abide event.

Present — BARNARD, P. J., and TALCOTT, J.

Judgment reversed and new trial granted, costs to abide event.

· MEMORANDA
OF
CASES NOT REPORTED IN FULL

**J. JAMES GLOVER, RESPONDENT, v. THE VILLAGE OF
EDGEWATER, APPELLANT.**

*Chapter 674, 1870—Lands in village of Edgewater—how assessed—Municipal
officers—neglect of duty by—effect of.*

Section one of title six of chapter 674 of the Laws of 1870, provides that the assessment roll for the village of Edgewater is to be prepared "in all respects, as far as practicable and consistent with the provisions of this act, in the manner prescribed by law in respect to assessments made by town assessors."

Land in the village belonging to the plaintiff, who was a non-resident, was assessed to him as a resident. *Held*, that the provisions of the Revised Statutes relate only to the taxes to be raised for town, county and State purposes; that under its charter, all lands in the village must be assessed in the name of the owner or occupant, and that the non-residence of an owner only gives him the right to be notified of the sale as provided by the act.

Section five of title twelve of the charter, requires that, at the expiration of ninety days from the delivery of the warrant to him, "the treasurer shall make a return, under oath, of all such taxes and assessments upon any lands or premises which shall be unpaid in whole or in part, and shall file the same in the office of the village clerk; and such treasurer shall annually, between the first day of March and the first day of April, cause such lands to be advertised for sale at public auction;" *held*, that the neglect of the treasurer to make the return as required by the act did not deprive him of the power of selling the lands.

APPEAL from a judgment in favor of the plaintiff.

T. C. Vermilye, for the appellant.

Robert Christie, for the respondent.

Opinion by **BARNARD, P. J.**

Present—**BARNARD, P. J., TALBOTT and TAPPEN, JJ.**

Judgment reversed and new trial granted.

ELIZA INGRAM, ADMINISTRATRIX, ETC., OF WM. INGRAM,
DECEASED, RESPONDENT, v. LYDIA F. YOUNG AND ANOTHER,
ADMINISTRATORS, ETC., OF OLIVER YOUNG, DECEASED,
APPELLANTS.

Wrong-door—3 B. S., 5th ed., p. 168—*Agent*—*ratification of acts of*.

William Ingram died, intestate, July 10th, 1864, leaving a widow, the plaintiff, and two minor children. The deceased had, at the time of his death, in his residence, \$625 in money, and \$300 in certificates of deposit, in the Port Jervis Bank. Immediately after his death, Oliver Young, the defendant's intestate, and the uncle of the plaintiff, told her that it was not safe to keep the money and securities in the house, and he afterward, apparently with her consent, deposited the same in the Port Jervis Bank. The plaintiff drew from the bank \$325, and the remaining \$700 was invested by Young in Government bonds, which were deposited in the bank, the plaintiff going to the bank and drawing the interest upon them regularly, up to July 1st, 1869. In December, 1869, the bank was robbed, and these bonds were stolen. In January, 1872, the plaintiff was appointed administratrix of William Ingram, and, Young having died, this action was brought to recover of his estate the value of the bonds; *held*, that she could not recover; first, because Young acted as her agent, and was not chargeable on the testimony either with neglect or conversion in respect to the property; and second, because the plaintiff adopted and ratified his act in investing the money and depositing the bonds.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

Groo & Wiggins, for the appellant.

Lewis E. Carr, for the respondent.

Opinion by TAPPEN, J.

Present—TALOOTH and TAPPEN, JJ.

Judgment reversed and new trial ordered.

JOHN G. BAINBRIDGE, EXECUTOR, ETC., APPELLANT, v.
ANDREW McCULLOUGH, ADMINISTRATOR, ETC., RESPOND-
ENT.

Executor — accounts of — objections to — must be specific.

The defendant obtained an order from the surrogate of the county of Queens, requiring the plaintiff to render his account, as executor, and show cause why the claim of the defendant, founded upon a judgment docketed against the plaintiff's testator during his lifetime, should not be paid. An account, duly verified by the plaintiff, with the proper vouchers, was thereupon filed with the surrogate, showing a balance of \$9.36 in his hands, applicable to the payment of the defendant's claim. At the hearing before the surrogate, the defendant urged that a large part of the expenditures, mentioned in the account, was not necessary for the settlement and preservation of the estate, and objected specifically to several items. No proofs of any kind were taken, save the account and vouchers, nor was the executor examined. Subsequently the surrogate made an order, directing payment of the defendant's claim, \$724.91. *Held*, that, as it nowhere appeared that the surrogate passed upon the items objected to, allowing or disallowing them, and as the verified accounts of the executor with vouchers for all the payments, raised the presumption that the payments were properly made,* and, as it rests with the party objecting, to establish more assets than are acknowledged by the account or inventory,† the order was improperly granted and should be reversed.

The proper practice is to state the objections in the form of distinct and specific allegations and give proof thereof, and this applies to all objections.‡

APPEAL from an order of the surrogate of the county of Queens, decreeing payment to the defendant, of \$724.91.

Sewell & Pierce, for the appellant.

John Fleming, for the respondent.

Opinion by TAPPEN, J.

Present — BARNARD, P. J., TALCOTT and TAPPEN, JJ.

Ordered reversed and proceeding remitted to surrogate.

* *Metzger v. Metzger*, 1 Brad., 265; *Westervelt v. Gregg*, 1 Barb. Ch., 460.

† *Marre v. Ginochio*, 2 Brad., 165.

‡ *Williams on Exec.*, 1784; *Young v. Skelton*, 3 Haggard, 784.

BERNARD COSTELLO, RESPONDENT, v. ANN T. DALE,
APPELLANT.

Mechanics' lien—items of work—action to enforce a lien for labor—Chap. 558, 1869.

The plaintiff performed certain services, under a written contract to plaster a house for a fixed sum. Work was commenced in April, 1872. The plaintiff did other work by order of the defendant, from time to time during the summer, the last item of work being performed 14th August, 1872. The lien was filed 7th September, 1872. The defendant asked the court to charge that, as matter of law, all work done previous to thirty days before the filing of the lien, must be excluded. The court refused so to charge. *Held*, that such refusal was proper. The lien act (chapter 558, 1869) gives liens for labor done, provided the notice is filed within thirty days after the performance and completion of such labor. The plaintiff's evidence tended to show that it was all really one piece of work, although the items were directed to be done, and were done, at different times between April and the fourteenth of August, and he was entitled, under the lien act, to recover for all his labor.

APPEAL from a judgment of the County Court of Westchester county in favor of the plaintiff, entered upon a verdict.

George A. Black, for the respondent.

Mundy & Stout, for the appellant.

Opinion by BARNARD, P. J.

Present—BARNARD, P. J., TAPPEN and TALCOTT, JJ.

* Judgment affirmed, with costs.

JOHN DEVLIN, RESPONDENT, v. GEORGE D. CRARY AND
OTHERS, APPELLANTS.

Sale—Delivery.

This action was brought to recover the price of certain whiskey, sold and delivered by the plaintiff to the defendant.

The defendants disputed the price, denied that the delivery was complete, and alleged that the goods were seized by the United States Government, by reason

* See *Goodale v. Walsh*, 2 N. Y. Sup. Ct. R., 811.

of certain unlawful acts of the plaintiff. The action was referred, and the referee found that the sale and delivery were complete, and determined the value of the goods. *Held*, that "the evidence fully sustained the referee in his finding," and "that without proof that the whiskey was seized by the United States Government for the plaintiff's acts, or his omissions to act, the defendant was liable."

APPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

De Witt & Johnson, for the plaintiff.

E. T. Wood, for the defendant.

Opinion by BARNARD, P. J.

Present—BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Judgment affirmed, with costs.

EDWARD MORAN, RESPONDENT, v. EDWARD A. DARRIN,
APPELLANT.

Contract—Fraud—Party entitled to recover money paid under fraudulent contract.

On the execution of a contract for the conveyance of land, the plaintiff was defrauded by an intentional omission of part of the property, which the defendant agreed to convey. The fraud was not known to the plaintiff, and, after its discovery, the defendant having refused to execute a contract such as should have been drawn, *held*, that the plaintiff had a right to maintain his action to recover the money payments, and that the fraudulent contract gave defendant no right to retain the money.

APPEAL from a judgment, entered on a verdict in favor of the plaintiff.

Ira D. Warren, for the respondent.

Charles Whelp, for the appellant.

Opinion by BARNARD, P. J.

Present—BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Judgment affirmed, with costs.

GEORGE A. MILLER, APPELLANT, v. CATHERINE HUNT,
RESPONDENT.

Married woman—articles supplied to, by order of husband—Separate estate of—when liable.

This action was brought to recover the price of certain manufactured articles, for the repair of a house belonging to the defendant. The articles were ordered by the husband of the defendant; and the jury having found that he was the general agent in reference to the repairs, and the defendant having accepted the fruits of his acts which increased the value of her estate, *held*, that the defendant was liable.

APPEAL from a judgment of the County Court, reversing a judgment of a Justice's Court.

Groo & Wiggins, for the appellant.

J. V. D. Benedict, for the respondent.

Opinion by BARNARD, P. J.

Present—BARNARD, P. J., TALCOTT and TAPPEN, JJ.

Judgment of County Court reversed, and judgment of Justice's Court, in favor of plaintiff, affirmed, with costs.

RICHARD ROWLAND, RESPONDENT, v. BENJAMIN A.
HEGEMAN, APPELLANT.

Evidence.

"The only exceptions presented by the appellant, where the ruling was claimed to have been erroneous, are those where the admission of the testimony was claimed to have been contrary to section 399 of the Code, as calling for a conversation between the witness and the testator. The testimony of the witness could not possibly have prejudiced the defendant. So far as it went, it was additional evidence of the same fact which the defendant had already sought to prove. As to the question of fact the referee did not err."

APPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

Horace M. Hastings, for the respondent.

Convers & Lyman, for the appellant.

Opinion by TALCOTT, J.

Present—BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Judgment affirmed.

NATHANIEL F. WARING, RESPONDENT, v. HENRY C.
YALE AND S. P. CARD, APPELLANTS.

Stay.

A stay for an indefinite time, to await the result in the appellate court, of an appeal in another action, because, only, of a hope that the judgment may be reversed in whole or in part, is not within the power of the court. Such a stay simply prevents a party from asserting a legal claim, until the decision of an appeal in another action.

APPEAL from part of an order made at Special Term, granting a stay of proceedings in an action upon an undertaking.

N. F. Waring, respondent, in person.

— —, for the appellants.

Opinion by BARNARD, P. J.

Present—BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Order granting stay reversed, with ten dollars costs; and motion for stay denied, without costs.

THE HOPE FIRE INSURANCE COMPANY, v. STEPHEN CAMBRELLING AND OTHERS.

Attorney—when knowledge of, is not knowledge of client.

Cambrelling being attorney for Mrs. Sherwood and Mrs. Babcock, in 1868 executed a mortgage to the latter, but did not record it. In 1869, he executed a mortgage on the same property to Mrs. Sherwood, and this mortgage was recorded. *Held*, that the party whose mortgage was recorded was entitled to the surplus money.

The rule that knowledge by a solicitor is knowledge by the client, where the solicitor is himself the borrower, has never been adopted in this State.

APPEAL from order of Special Term.

Henry Nicoll, for Emily Sherwood, appellant.

C. A. Hand, for H. C. Babcock, respondent.

Opinion by BARNARD, P. J.

Present—BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Order reversed, with costs.

HENRY HARTEAU, RESPONDENT, v. THE DEER PARK BLUE STONE COMPANY.

Injunction—Contempt for violation of—referee—duty of, in proceeding to punish for.

Where, in a proceeding instituted to punish one G. for contempt, for violating an injunction issued in this case, the order of reference, after reciting that the motion to punish the defendants for contempt came on to be heard, thus proceeds, "It is ordered that this proceeding be and the same is hereby referred to Henry J. Cullen, Esq., a counselor of this court, to take testimony in regard to the same, and report with all due speed to this court his opinion thereon;" *held*, that it was the duty of the referee, under such order, to take proof as to, and to determine the extent of, the loss and injury which the plaintiff had suffered by the violation of the injunction.

SECOND DEPARTMENT, MAY TERM, 1874.

APPEAL from an order of the Special Term, convicting A. E. G. of contempt, in violating an injunction, issued in this case, and imposing a fine therefor.

Opinion by TALCOTT, J.

Present — BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Order affirmed, with costs.

JAMES A. WHITBECK, RESPONDENT, v. STEPHEN BILLINGS AND DENNIS MCGUIRE, APPELLANTS.

School taxes—seizure of property by collector of, without proper notice—remedy of party aggrieved—costs—when not allowed—Chapter 555, 1864.

The defendant McGuire, as collector, seized, under the direction of defendant Billings, the trustee of the district, certain property of the plaintiff, for non-payment of the school tax, without having posted the notices required by law. In an action brought by the plaintiff for such seizure, *held*, that the plaintiff had the right to appeal to the Superintendent of Public Instruction, under sections 1 and 2, of title 12, of chapter 555, of the Laws of 1864, and that as the judge, before whom the case was tried, certified, in pursuance of section 6, of title 13, of said chapter, that the defendant acted in good faith, the plaintiff was not entitled to costs.

APPEAL from an order directing the clerk to tax the plaintiff's costs.

Opinion by BARNARD, P. J.

Present — BARNARD, P. J., TALCOTT and TAPPEN, JJ.

Order reversed, with costs.

SIMPSON TOLAN RESPONDENT, v. FRANK CONOVER AND
ANOTHER, APPELLANTS.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial.

The appellant claimed that the testimony in the case was not sufficient to sustain the verdict of the jury, but the General Term held that it was, and affirmed the judgment and order.

Britton, Ely and Snell, for the appellants.

S. D. Morris, for the respondent.

Opinion by TAPPEN, J.

Present — BARNARD, P. J., TALCOTT and TAPPEN, JJ.

Judgment and order affirmed.

BREWSTER WOODHULL, RESPONDENT, v. SAMUEL B.
MOWER, APPELLANT.

APPEAL from a judgment in favor of the plaintiff, entered on a verdict.

“This case presents for review a pure question of fact” and “the verdict will not be disturbed.”

Plaintiff in person.

C. J. G. Hall, for the appellant.

Opinion by BARNARD, P. J.

Present—BARNARD, P. J., TALCOTT and TAPPEN, JJ.

Judgment affirmed, with costs.

Cases

DETERMINED IN THE

THIRD DEPARTMENT

AT

GENERAL TERM,

June, 1874.

IN THE MATTER OF THE NEW YORK AND CANADA RAILROAD COMPANY, RESPONDENT, v. GEORGE GUNNISON, APPELLANT.

Railroad — Real estate — when company cannot take without owner's consent.

Under the statutes authorizing railroad companies to acquire title to real estate without the owner's consent, a company cannot take land simply for the purpose of removing gravel therefrom, to be used in constructing a distant portion of its road.

APPEAL from an order of the Special Term, appointing commissioners to appraise the value of the lands to be taken by the New York and Canada Railroad Company, for the purpose of constructing their road.

Mr. Hutchings, for railroad company.

D. B. Hill, for George Gunnison.

BOARDMAN, J.:

From a reading of the appeal papers, it is fair to say that the railroad company needs, and will need, additional lands for side tracks and storing cars. Whether the necessity requires the use of

the particular lands in controversy, is not so clear. Still, enough is shown, of difficulties and obstructions in other neighboring localities, to lead to the conclusion that no other property is so available, or could be rendered so useful at so small an expense, as these lands of Gunnison. If so, the selection of proper grounds for these, and other necessary purposes, is very much in the discretion of the managers, if exercised in good faith.

But the railroad company claims the right, and indicates an intent to use a portion of the lands, of which it seeks to acquire the title, for the purpose of taking therefrom, gravel, to ballast the road for many miles to the south of Crown Point. It appears that this land is mostly made up of a fine quality of gravel, suitable for such purpose, and that no suitable gravel can be obtained for fifteen miles south of it. One of the objects for which such land is necessary to said company, is to excavate and carry away this gravel for ballast.

The right of eminent domain is harsh in its application to individual rights. It is given for the public advantage, and to accomplish a public purpose. To accomplish such purpose, the railroad company is allowed to take private property, upon just compensation. Whatever is essential and indispensable to the construction, maintenance or running of the road, is allowed to be taken. What the company acquires, is not a fee simple to the lands—not an absolute right to use them, irrespective of the title and interests remaining in the individual—but a right of way, and the right to adapt the soil and land, within its limits, to the ordinary uses and necessities of such a way. If a cut is required, the soil taken therefrom may be used for a fill, wherever needed. But it has not been considered lawful, so far as I can discover, to take lands outside the limits of its way; to remove earth, timber, rocks or materials therefrom for the building of its road, under the right of eminent domain and public necessity.* At page 552, of the last case, ALLEN, J., says: "The right to take lands upon which to erect a manufactory of cars * * * is not included in the grant. Neither can lands be taken for a mere subsidiary or extraordinary purpose." He then indicates many of the purposes considered

* 1 Red. on Rail., 242 (n 6), 247, (n 2); In Matter of N. Y. and H. R. R. v. Kip, 46 N. Y., 546.

indispensable, such as justify the taking of land *in invitum*. But he nowhere intimates that the soil, below grade, may be taken and carried away for use in other localities. Such an act would be in excess of a right of way, or passage. Such act is not essential to the construction and maintenance of a railroad, more than the use of ties or fuel. Yet, no one would maintain that a railroad company could condemn land, for the purposes of ties or fuel.

The general principles, applicable to such cases, are well considered in *R. R. Co. v. Davis*.^{*} The right of condemnation is the exercise of an extraordinary power reserved by the State, in hostility to the private rights of citizens. It must therefore be expressly granted, when exercised by a private or municipal corporation. The grant will not be extended by inference or implication. Nor can anything be taken, except by virtue of the law, for the benefit of the public, and under an indispensable necessity in the construction and maintenance of the road. It is not sufficient that it is convenient or cheaper for the road. Because, such a rule would apply to ties, fuel, or outside soil for the purposes of embankments. It follows that the railroad company cannot acquire the right to this land, for the purpose of excavating the soil and carrying it away for many miles, under the doctrine of eminent domain, by virtue of the statutes now in force.

The statute of 1869[†] enlarges the rights and powers of railroad companies, but such law only applies to railroads completed, and to the acquisition of other lands beyond their original necessities.[‡] But upon the merits of this case, the railroad company does not bring itself within any rule of necessity. All that is claimed in the affidavits on behalf of this application, is, that no gravel, suitable for ballast, is to be had upon its road, south of these lands, for ten or fifteen miles; and that no other gravel, as good as this, is found upon the line of its road, between Port Henry and Putnam, a distance of twenty miles. By the affidavit of Buck, it appears that the company has obtained large amounts of gravel, just north of these lands; and, upon information and belief, that the company has purchased and owned several acres, within one-half mile of Gunnison's, on the north, and that additional gravel beds can there be procured, at a reasonable rate. By the

^{*} 43 N. Y., 137.[†] Chap. 237.[‡] *Railroad Co. v. Davis*, 43 N. Y., 143.

affidavit of W. C. Gunnison, it further appears that the company owns another gravel bed, of great extent and good quality, from four to five miles north of Gunnison's, and, since March, 1873, has been removing the same for railroad uses. These facts are not controverted by the petitioner.

In view of these facts, of the value and situation of these lands, it would seem to be an unjust and unnecessary exercise of the power conferred upon the company, if these lands, or any part thereof, were taken for the excavation of gravel therefrom.

By reference to *N. Y. and B. R. R. v. Godwin*,* and *Matter of N. Y. and J. R. R. Co.*,† it may be doubted whether the map of the company, on file, properly shows the extent of the land to be taken. I am inclined to the opinion, however, that the description in the petition is sufficient, and obviates the objection to the proceedings.

No other objection requires particular notice. It follows that the order of the Special Term should be reversed, with ten dollars costs, and the motion to appoint commissioners of appraisement, should be denied, with ten dollars costs, but without prejudice to a new application.

Present—MILLER, P. J., BOARDMAN and JAMES, JJ.

Order reversed, with costs

JOHN B. NORTON, APPELLANT, v. RUSSELL B. MALLORY
AND ANOTHER, RESPONDENTS.

Statute of uses and trusts — what trusts not affected by — When trusts arise by implication of law — Conveyance by trustee to cestui que trust — when fraudulent, as to creditors.

In 1868, Sarah Mallory, the mother of the defendant, Russell, was the owner of a lot of forty-one acres, and had an interest in certain other real estate in connection with her said son, who desired her to unite with him in the sale of the latter, and allow him to receive and enjoy the proceeds of such sale, for his own use and benefit. It was finally orally agreed that this should be done, and, in consideration thereof, the said Russell, the heir at-law of the said Sarah, agreed that

* 12 Abb., N. S., 21; S. C., 62 Barb., 85.

† 21 How., 434.

upon her death, he would convey the forty-one acres to his son, the defendant, F. E. In pursuance of this agreement, the sale was made. Sarah died in September, 1868, intestate. In November, 1870, the defendant, Russell, without any intent to cheat or defraud his creditors, conveyed the forty-one acres to his said son, by deed, which was recorded November 26, 1870. Prior to that time the plaintiff had commenced actions against the said Russell, in which he subsequently recovered judgments. This action was brought, to have the conveyance set aside. *Held*, that the complaint was properly dismissed. That upon the death of Sarah Mallory, the land descended to Russell, as her heir-at-law, and he held the same, as trustee for his son. That his agreement to convey the same was founded upon a valuable consideration, and would be enforced by a court of equity. And that as the trust arose by implication of law, it was not invalidated by the statute of uses and trusts.

APPEAL from a judgment, dismissing plaintiff's complaint with costs.

Sarah Mallory was the mother of the defendant, Russell B. Mallory, and grandmother of the defendant, Frederick E. Mallory, who is the son of Russell B. Mallory. In 1868, Sarah was the owner of a considerable interest in real estate, in connection with her son Russell. Russell desired her to unite with him in the sale of such lands, and allow him to have and enjoy, absolutely, the proceeds of such sale, for his own use and benefit. It was finally agreed that this should be done, upon condition that Russell, who was her only heir-at-law, should, at her death, convey a lot of forty-one acres of land, which she owned absolutely and was not to sell, to his son, the defendant Frederick E. Mallory, then an infant about four years old. The sale of all the lands, except the forty-one acres, was accordingly made, and Russell received and retained all the proceeds. In September, 1868, Sarah Mallory died intestate, leaving the defendant Russell, her only child and heir-at-law, whereby he became possessed of an apparent title, in fee simple, to forty-one acres, by inheritance.

In November, 1870, the said Russell being then in an embarrassed or insolvent condition, he and his wife joined in the conveyance of said forty-one acres of land to his son, the defendant Frederick E. The deed was recorded, November 26, 1870. The judge finds that such conveyance was made in pursuance of the agreement with his mother, and in good faith, without any intent to cheat or defraud his creditors, or hinder or delay them in the collection of their debts, but with the intent that such deed should precede the plain-

tiff's judgment, hereinafter referred to, and prevent such judgment from becoming a lien upon said lands. After the recording of said deed, the plaintiff recovered judgment against Russell, for about \$1,000 in all, upon an indebtedness from said Russell to the plaintiff, existing in April, 1870. Such judgments were duly docketed in Schuylers county, where said lands were situate, and executions thereon were returned unsatisfied, as to a large portion thereof. This action was then brought by the plaintiff, to set aside such conveyance, and to charge said lands with the payment of such judgments.

Upon the trial, the facts were found substantially as above set forth, and plaintiff's complaint dismissed, upon the ground that Frederick E. was, in equity, entitled to such conveyance, and that it was not in fraud of the plaintiff.

Scott Lord, for the appellant.

John J. Van Allen, for the respondents.



BOARDMAN, J. :

Prior to the Revised Statutes, no doubt can exist that the arrangement between Russell and his mother would have created a valid trust. "The most simple form in which an implied trust can be presented is that of property delivered by one person to another, to be by the latter delivered over to and for the benefit of a third person." * "If there be either a good or valuable consideration, equity will raise a use or trust corresponding to such consideration." † Such trusts are treated as implied or created by operation of the law, and are not affected by the provisions of the Revised Statutes. ‡ The case under consideration is not a resulting trust in favor of creditors, under section 52, because the plaintiff is not a creditor of the person paying the money. She paid the consideration to Russell, who, by her death, took the title to the land in question, under a contract, by which he held the legal title in trust for, and subject to, the equitable title of his son. By the fiftieth section, trusts arising or resulting by implication of law, are not

* 2 Story's Eq. Jur., § 1196.

† Id., § 1197; see also Id., § 1210.

‡ 2 R. S., 728, §§ 50, 51, 52 and 53.

abolished. The trust in this case is of that character and is valid.

The evidence justified the court below, in finding the existence of the agreement, under which the trust arises. The agreement and payment of the consideration being so found upon sufficient evidence, the consequences are inevitable. It would be inequitable and unjust that Russell should have the consideration, derived from the sale of his mother's lands, for the payment of his debts, and that his creditors should still be at liberty to take the property in dispute, devoted by the mother to an entirely different purpose. The creditor would thus have a double fund, out of which to secure his debt. The second fund would be one not justly applicable to the payment of the debt, or equitably belonging to the debtor, but, in fairness and good conscience, belonging to Fred. E., under the agreement. Fred. E. was and is an infant of such tender years, as to be incapable of understanding or assenting to the arrangement between his father and grandmother. But, as the agreement was beneficial to him, the court will assume his assent and acceptance of the property under the deed. The case is stronger for the beneficiary than that of *Sieman v. Austin*,* where the creditor's judgment was recovered and became a lien upon the trust property, before the conveyance from the trustee to the *cestui que trust*. In other respects, it is very similar. In that case, it was held that the Revised Statutes, relating to uses and trusts, were inapplicable, and that the common law governed the rights of the parties. The same view is taken in 4 Kent's Commentaries. † "If a trust be created for the benefit of a third person without his knowledge, he may when he has notice of it, affirm the trust, and call upon the court to enforce the performance of it." It is also held, in *Sieman v. Austin*, ‡ that the prohibition of section 51, of a trust resulting to the person paying the consideration, does not apply to a resulting trust for the benefit of a third person. Such conclusion must be still more clear, when such person, as in this case, was not of an age to know of, or assent to, the act by which the title vests in the trustee. The authorities are quite conclusive, that a trust, of the character claimed in this case, may be created, and that, when created, the equities of the *cestui*

* 33 Barb., 9; affirmed in 29 N. Y., 598.

† Page 307.

‡ *Ante*.

que trust are superior to those of any creditor of the trustee, except, perhaps, an incumbrancer who has parted with his money upon the security of the property, without notice of prior equities. It is claimed by the appellant, that a trust cannot be created by parol. The Revised Statutes* prohibit the creation of trusts, except by act or operation of law, or by writing, etc. The next section (7th) provides that the sixth section shall not be construed to prevent any trust from arising by implication or operation of law. Such trusts may be proved by parol, provided they flow from acts, relations, situations and conditions of the parties, impressing property with trust character, and imposing upon the party holding property, the obligations of a trustee towards the beneficiary. †

Conceding the findings of the court below to be right (and there is no evidence from which a doubt can arise), the case was properly disposed of. The suggestions of danger from such secret trusts, and from perjury in establishing them, are pertinent and forcible, but are properly addressed to the court of original jurisdiction. Having produced conviction there, and being in no respects incredible, impossible or contradicted, this court would not be justified in disregarding or disbelieving such evidence.

I am inclined to the belief that Davis' testimony was admissible upon the question of Russell's good faith in making the deed to his son. But if it were not, there is abundant and uncontradicted evidence without it, to sustain the conclusions of the court below. In equity cases, errors in the reception of evidence will not be regarded, when it is apparent they could not have affected the result. ‡

If these views are correct, the judgment should be affirmed with costs.

Present—MILLER, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs.

* 2 R. S., 185, § 6. † Foote v. Bryant, 47 N. Y., 544; Perry on Trusts, § 157.

‡ Foote v. Bryant, 47 N. Y., 544, 551; Rundle v. Allison, 34 N. Y., 180, 184; Ashley v. Marshall, 29 id., 494, 502.

STEPHEN W. CARD, PLAINTIFF, v. JOHN K. MILLER AND
PARMELIA MILLER, DEFENDANTS.

Promissory note — Alterations of — when material — when note avoided by.

The defendant, J. K. Miller, made his promissory note for \$500, payable to the order of one Knapp, the note reading, "I promise to pay," etc. Subsequently, Knapp, without the knowledge or consent of J. K. Miller, persuaded the defendant, P. Miller, to sign her name to the note, under the name of J. K. Miller. Afterward, and before its maturity, the note came into the hands of the plaintiff, a *bona fide* purchaser, for a valuable consideration, without notice. In an action brought by him upon the note, *held*, that he was entitled to recover against both of the defendants. That the addition of P. Miller's name to the note, was not a material alteration thereof, and did not render it invalid as to the original maker.

Brownell v. Winnie (29 N. Y., 400) and *McCaughy v. Smith* (27 id., 89), followed; *Chappell v. Spencer* (23 Barb., 584) and *McVean v. Scott* (46 id., 379), overruled.

MOTION for a new trial, on exceptions ordered to be heard in the first instance at the General Term.

On October 31, 1871, the defendant, John K. Miller, made and delivered to one Knapp, his promissory note for \$500, payable to the order of the said Knapp, six months after the date thereof. The consideration for such note, was the assignment by the said Knapp, as attorney for one Jencks, of letters patent for an improved match safe, and an agreement between Knapp and Miller to enter into the manufacture of such safes, as partners. Knapp, however, only wanted the note to satisfy Jencks that the sale had been made, and agreed that the note, or Miller's half of it, should only be paid out of the profits of the business.

After the note had thus been made and delivered by John K. Miller to Knapp, the latter, in three or four days, went to Parmelia Miller, the mother of defendant, John K. Miller, and, without the knowledge or consent of John K., persuaded her to sign her name to the note, under the name of John K., the note being written "I promise to pay," etc.

Soon after the note had been so signed, Knapp sold and transferred the note to one Sprague, and, by subsequent sales, the note came into the hands of the plaintiff, for a valuable consideration, before it was due, and without notice on the part of the plaintiff, of any defects or defenses. The note not being paid when due, this

action was brought, and, upon the trial at the circuit, a verdict was ordered by the court for the amount of the note, against both defendants.

Two exceptions were urged upon this motion for a new trial, which were ordered to be heard in the first instance at the General Term.

1st. That there was no such evidence of Knapp's indorsement of the note as to warrant a recovery.

2d. That the addition of Mrs. Miller's name, after the negotiation and delivery of the note to Knapp, without the knowledge or consent of John K., was a material alteration of the note and avoided it.

M. M. Waters, for the plaintiff, cited *Brownell v. Winnie* (29 N. Y., 400; 2 Am. Rep., 598); *Flint v. Craig* (59 Barb., 319); *Cromwell v. Hewitt* (40 N. Y., 491).

O. Porter, for the plaintiff, cited *Lewis v. Payne* (8 Cow., 71); *Nunny v. Colton* (1 Hawks., 222); *Jewitt v. Hodgden* (3 Green., 103); *Irving v. Turnpike* (2 Penn., 466).

BOARDMAN, J.:

The evidence of Knapp's indorsement was sufficient to establish the fact. In any event, it could only have been error to have refused to submit that question to the jury, upon the request by the defendant. No such request was specially made by the defendant. The testimony of St. John was competent, and tended to establish Knapp's indorsement. It was also proved by the defendant, that Sprague bought the note of Knapp. All the evidence in the case went to establish the genuineness of the indorsement, and no evidence was given, showing, or tending to show, that it was not genuine. Under such circumstances, the court was justified in treating the proof as sufficient. But if not, the neglect of the defendant to request the submission of that specific question to the jury, was a waiver of the objection.*

A more serious question arises upon the alteration of the note, by adding the name of Mrs. Miller, after its delivery to Knapp,

* *Bidwell v. Lament*, 17 How., 357.

without the knowledge of her son. The authorities are in conflict upon this subject. In *Chappell v. Spencer*,* and in *Mc Vean v. Scott*,† such an alteration is held to be material, and to avoid the note, as to the original maker. But, in *Brownell v. Winnie*,‡ and *McCaughey v. Smith*,§ such an alteration has been held by the Court of Appeals, not to be material, or to affect the validity of the note. It is true that the original maker of the note did not defend, in *Brownell v. Winnie*, and that the person, making the alteration, alone defended, so that the precise question was not before the court. The case of *McCaughey v. Smith*, has been severely criticised in *Mc Vean v. Scott*,|| and declared to be bad law. Still, in the face of two such distinct declarations of the law of this case by the Court of Appeals, I do not feel at liberty to say the alteration under consideration was material. This note was a several note, and it may well be said, the liability of John K. is not increased or varied by the addition of his mother's name as an additional maker, any more than it would have been, if she had guaranteed the payment of the note. Had the form of the signature, as set up in the complaint, to wit: "John K. Miller and Parmelia Miller," been established upon the trial, a different question might have been raised; because, such a signature would import, in law, a joint, and not a several liability. But the case shows only the several signatures of the two defendants, by which a several, and not a joint liability is created. Without attempting to review the authorities, I feel bound to recognize and follow the cases cited in the Court of Appeals.

The motion for a new trial is therefore denied, and judgment ordered for the plaintiff upon the verdict, with costs.

Present—MILLER, P. J., BOARDMAN and JAMES, JJ.

JAMES, J., dissented as to the sufficiency of the evidence to establish the indorsement of the note by Knapp, but concurred with BOARDMAN, J., as to the effect of the alteration of the note.

Judgment ordered for the plaintiff, with costs.

* 23 Barb., 584.

† 46 Barb., 879.

‡ 29 N. Y., 400.

§ 27 N. Y., 39.

|| 46 Barb., 387.

CORNELIUS VAN RENSSELAER, RESPONDENT, v. THE ALBANY AND STOCKBRIDGE RAILROAD COMPANY, APPELLANT.

Easement — what constitutes — may be imposed by covenant — Negligence.

The owner in fee of land may impose upon it any burden, however injurious or destructive, not inconsistent with his general right of ownership, if such burden be not in violation of public policy and do not injuriously affect the rights or property of others. And where the nature of the charge is such that it may be made by grant, it may be equally imposed by covenant.

In 1859, the plaintiff's father was the owner of land, through which the defendant's road was built, on the side of a steep hill. In that year, the embankment for the road slipped out upon the adjoining land, causing damage which was settled between the plaintiff's father and the defendant. At the time of the settlement, a writing under seal, executed by the plaintiff's father, was given to the defendant, by which he released the defendant from all claims for the damage already occasioned, and agreed that, if in consequence of the peculiar construction of the embankment, or of the nature of the soil at the point where the embankment joined his land, land-slides should thereafter occur, that he, his heirs and legal representatives, should consider the money then paid, as compensation in full for all past and future damage, and that the instrument so signed should be a bar to all future claims.

In 1869, another land-slide occurred, occasioning damage to the land, which had descended to the plaintiff, as heir-at-law of his father, to recover for which damage, this action was brought. *Held*, that by virtue of the covenant contained in the agreement, the defendant acquired an easement in the land, which was bound thereby in the hands of the plaintiff; and that, as the negligence of the defendant, if any, was not willful or permitted with any hostile or offensive purpose, the plaintiff could not recover.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of referees.

In 1859, the father of the plaintiff was the owner of land, through which defendant's road was built, on a steep hill-side. The embankment for the road having slipped down upon the adjoining land, causing damage, such damage was settled between plaintiff's father and the defendant, in January, 1859, and a writing given by the said plaintiff's father to defendant, under seal, first, releasing and discharging the defendant from such damage, and second, as follows: "I do also, for the same consideration, and for myself, executors, administrators and assigns, hereby agree with said cor-

poration, that if in consequence of the peculiar construction of said embankment or of the nature of the soil at the point where said embankment adjoins my land, land-slides shall hereafter occur from said embankment, whereby earth or other material shall be deposited on my lot, that I will make no claim for damages therefor, and that I will, and my heirs and legal representatives shall consider the money this day paid by said corporation, compensation in full for all past and all future damage to my land, which has happened, or may hereafter occur in consequence of said embankment, and this instrument, a bar to all future claim." Plaintiff, upon the death of his father, succeeded to the title to his lands, by inheritance, in 1868. In 1869, during a heavy storm, another slide from such embankment came down upon plaintiff's land, to his damage, for which this action was brought. The referees found that the embankment was improperly and negligently constructed, and that the injury complained of, was caused by the carelessness of the defendant.

George W. Miller, for the appellant.

George C. Genet, for the respondent.

BOARDMAN, J.:

If the instrument executed by plaintiff's father, bars the plaintiff's right of action, it will not become necessary to consider the question of negligence raised upon the hearing. It can scarcely be denied, that such a burden as that contemplated in the contract, can be imposed by grant upon one's realty. It is very like a grant of the right of drip from eaves; or the right to flood lands or to discharge water, with or without refuse matter, upon lands of another;* or the right of support to the soil or buildings of one party, by the property of another; or the right to change the course, impede the flow, or increase or diminish the quantity of water in a stream through adjoining lands. All these are familiar cases of easements, known and recognized by the law. The right to maintain such embankment, to the detriment or damage of the adjacent land, was a right which plaintiff's father could con-

* *Bushnell v. Proprietors, etc.*, 81 Conn., 150.

vey to defendant, and, by such conveyance, deprive himself and his heir of any recovery for damages contemplated by the parties. Such a grant would have created an easement upon plaintiff's land in favor of the defendant. It relates directly to the land; the right is a burden upon it. The owner may thereby be deprived of its full use. The land may be incumbered in a manner inconsistent with the general right of ownership in the plaintiff. Nor is it, in this view, inconsistent with the case of *Keppell v. Bailey*.^{*} In that case, the covenant was held to be personal, not running with the land, nor binding assignees. That case has not been overruled as a decision of the questions before the court; but certain *dicta* of the lord chancellor have been condemned and rejected. The subject is very fully considered in *Spencer's Case* and the notes thereto.[†]

It results from the cases, that the owner in fee of land, may impose upon it any burden, however injurious or destructive, not inconsistent with his general right of ownership, if such burden is not in violation of public policy, and does not injuriously affect the rights or property of others.

But the instrument under consideration is not, in terms, a grant or conveyance, but rather an agreement or covenant not to sue for any damages thereafter occurring; in effect giving to defendant the right to the use of plaintiff's land, as and when it should become necessary, by reason of defects in the building up and sustaining of its track and embankment. Upon such a construction of the contract, no reason is apparent why the burden should not be imposed by the covenant, since, by its nature, it could have been given by a grant.[‡]

If we are right in holding that such a servitude can be imposed upon land, and that, when the nature of the charge is such that it might have been made by grant, it may be equally imposed by covenant, it follows that the covenant of plaintiff's father runs with the land, and subjects the same in the hands of his son, to all the conse-

^{*} 3 Mylne & Keene, 517.

[†] 1 Sm. Lead. Cases part 1, pp. 115, 129; *Rowbotham v. Wilson*, 8 Ell. & B., 123; 92 Eng. C. L. R., 122; *Gilbert v. Peteler*, 38 Barb., 488; affirmed, after new trial, in Court of Appeals, 38 N. Y., 165.

[‡] *Carr v. Lowry*, 3 Casey, 257; *Barrow v. Richard*, 8 Paige, 351; *Gilbert v. Peteler*, and *Rowbottom v. Wilson*, *ante*; 1 Smith Lead. Cases, 144, 165, 166, 178, 179, and cases there cited.

quences that would exist against the father. Such would be the case even against an assignee.*

The idea of a perpetuity in a vested right to maintain a negligent structure, is well answered by the lord chancellor, in *Keppell v. Bailey*,† wherein he shows that the principle of a perpetuity is not involved in the case.

Nor is there anything in the novelty of such an easement, as suggested in the opinion of the referees, which should lead to its rejection. That such charges upon land have hitherto been unknown to the law, or unnecessary in experience, cannot destroy the power of creation. The arts and sciences are constantly developing new industries and new necessities for subjecting realty and population to strange burdens of a novel character. It is the province of the law to adapt itself to such wants. In this particular case, it may be, and probably is, a necessity that the defendant's roadway should pass along that side-hill; that the formation of such hill is such that an embankment cannot be built, except at extravagant expense, which shall be free from the chance of sliding down upon the lower land; that thus the defendant needed to own such lower lands, or else the right to subject them to the possible injury from land-slides from said embankment. What more reasonable than that defendant should desire to acquire such right, thus preventing plaintiff or his ancestor, from making valuable improvements upon the lands liable to injury? What more natural than that the plaintiff's father should be willing to accept of a compensation for such risk, agreed upon between the parties, and still own and enjoy the ordinary use and profits to be derived therefrom? Such seems to have been the conduct of the parties. Though it may have become an unfortunate contract for the plaintiff, it cannot alter the result. The extent of the injury may be due to an indirect use and improvement of the lands, in view of their exposure—a use not contemplated when the contract was made.

Entertaining such views, after a careful examination and study of the law applicable to the case, it is unnecessary to discuss the subject of negligence as developed by the evidence. It is not claimed that such negligence, if it existed, was willful or permitted

* *Holmes v. Buckley*, 1 Eq. Cases, p. 27, F. 4; *Norman v. Wells*, 17 Wend., 136

† *Ante*.

with any hostile or offensive purpose. It could not, therefore, furnish a ground for action, in spite of, and notwithstanding the covenant.

If the views taken of this contract, be not correct, the result must follow, that the defendant acquired thereby nothing but a release and discharge, arising from the damages caused in 1859. Such a construction would be a plain contradiction of the language and apparent intent of the parties to the agreement. It would leave the plaintiff the same right to recover for ordinary neglect that he would have in the absence of the agreement. The defendant, by the agreement and the consideration paid, has acquired no right which the law did not give without such an agreement.

Believing that this contract had a purpose beyond the mere settlement of the damages of 1859; that such purpose is justified in the law, as proper and legal; and that the effect of such contract is to exempt the defendant from liability for ordinary or casual negligence, I am of the opinion that the judgment should be reversed, and a new trial granted, costs to abide the event.

MILLER, P. J. (dissenting):

The question in this case is, whether the instrument, executed by the father of the plaintiff, on the 20th of January, 1869, was a bar to a recovery.

By the instrument referred to, the plaintiff's father released all claims for damages, by reason of any land-slides from the embankment of the defendant, and agreed that if any land-slides should afterward occur, that he would make no claim for damages; and that he and his heirs and representatives would consider the money, paid by the defendant at the time of the execution of the agreement, in full for all damages to his land, and a bar to all future claim. I am inclined to think that the instrument, executed by the plaintiff's father, was not of such a character as to prevent a recovery under the circumstances presented, and I am brought to this conclusion for the following reasons:

First. There was evidence upon the trial to show, and the referees found, that there was negligence on the part of the defendant, in allowing the embankment to remain in the condition in which it was at the time of the injury complained of, and had

been, ever since the agreement was executed. Under ordinary circumstances, there would be no question that the defendant would be liable for negligence, even although the right to claim damages had been discharged. The instrument, I think, does not relieve the defendant from such liability. Although it provides against damages in consequence of the peculiar construction of said embankment, or the nature of the soil, it must be held, I think, to require of the defendant, the exercise of reasonable care to prevent its sliding, and imposes upon the defendant the duty of guarding against negligence and carelessness. Even if it may be considered as excusing the construction, at the time when the agreement was executed, it cannot protect the defendant, as the proof shows that after the writing was executed, no steps were taken to protect the embankment, the ditches being filled up, and the water being allowed to collect, so as to affect the soil and cause it to slide.

Second. Even if the right claimed by the defendant may be considered as analogous to an easement, which I very much doubt, as no such easements have ever yet been recognized in land, I am inclined to think that the writing does not contain language which creates an easement. It does not, in appropriate phraseology, grant the privilege of allowing the embankment to slide on the land, or create a servitude in regard to the land for any such purpose. It only provides for exemption from the payment of further damages, which is a personal covenant and nothing more.

Third. If an easement was properly created with a covenant which bound the heirs and the land itself, it might be regarded as a covenant running with the land, and binding on the defendant for that reason. But there are no terms employed, which invest it with any such character. Although it may bind the party or his lawful representatives, when a proper action is brought, it cannot, I think, be obligatory upon the owner of the land, as such. If the owner was a stranger without notice, and there was no instrument or record showing such a lien upon the land, clearly, he would not be bound; and, in principle, it seems to me that the heir-at-law takes the land without any other incumbrances upon it, except such as appear from instruments which show on their face an intent to bind the land, and clearly do so bind it.

Fourth. I am inclined to think that a release of damages before they have occurred, is not binding, because it is based upon some event which may never happen, and therefore is not a promise for a valid consideration. It is in mere anticipation of some possible future injury, which is a mere naked possibility which can never be the subject of a release.*

For the reasons stated, I am of the opinion that the judgment was right and should be affirmed, with costs.

Present—MILLER, P. J., BOOKES and BOARDMAN, JJ.

MILLER, P. J., dissented.

Judgment reversed and new trial ordered, costs to abide the event.

JOHN POWELL, PLAINTIFF, v. HAMILTON S. PRESTON,
DEFENDANT.

Vendor and vendee — Conditional sale — when made in good faith, condition is sustained as against creditors of vendee.

A conditional sale of goods, under which the title to those sold, and to such other goods as might be purchased and added to the stock by the vendee, was to be in the vendor, until certain moneys should be paid by the vendee, will not protect the sheriff for levying upon the goods under an execution against the vendee, when, before such levy, the vendor had taken possession of both the goods sold (to which, at the time of sale, he had a good title), and of those purchased by the vendee since the sale.

In an action brought by the vendor against the sheriff for taking and selling such goods, the jury having found that the vendor's possession was not fraudulent or in bad faith, *held*, that he was entitled to recover their value from the sheriff.

Ludden v. Haen (81 Barb., 650) and *Grinbold v. Sheldon* (4 N. Y., 581) distinguished.

Ballard v. Burgett (40 N. Y., 814), *Austin v. Dye* (46 N. Y., 500) followed.

THE plaintiff being the owner of a stock of goods in a store, sold the same to his son, E. H. Powell, conditionally; that is, plaintiff was to retain the title to the goods until they were paid for,

* *Edwards v. Varick*, 5 Denio, 691.

and until certain debts due third parties were paid. It was subsequently agreed between them, that all future purchases of goods by the son, should belong to the father, upon the same conditions, and that the son might reduce the stock and notes, and accounts, by paying to plaintiff a proportional amount of his claims against the son. The agreements by which such a condition of affairs existed, were made at different times between January and June, 1870, and, under such agreements, the son had been in possession of the goods, buying and selling, and so continued until November 1st, 1870. At this time, the plaintiff, by his agents, and in the absence of his son, took possession of the store and goods, and afterward, with the aid of the son, inventoried them, and continued to retain possession until the 20th of November, 1870, when the same were levied upon by defendant, as sheriff, under executions issued upon judgments against the son, E. H. Powell. By virtue of such executions, the goods were afterward sold. The plaintiff brought this action against the sheriff for taking and selling such goods, and had a verdict for their value, at the circuit. The exceptions were ordered heard in the first instance at the General Term.

William Youmans, Jr., for the plaintiff.

C. H. Bell, for the defendant.

BOARDMAN, J.:

If Edward H. Powell had remained in the possession of the goods, until the levy by defendant had been made, the cases of *Ludden v. Hazen*,* and *Griswold v. Sheldon*,† would have been authorities in point, and perhaps conclusive in favor of defendant. They are distinguished from the case under consideration, in that Edward H. Powell was not in possession of the property, at the time of the levy. The plaintiff had possession of it under a claim of ownership. If he was in fact the owner, the defendant was a trespasser, in levying and selling. But if plaintiff was not the owner, or his title was fraudulent and void as to the creditors of Edward H., the defendant was justified in his seizure and sale.

It is not denied that Edward H. had not paid the plaintiff the

* 31 Barb., 650.

† 4 N. Y., 581.

purchase-price of the goods, nor that plaintiff sold the goods to Edward H., conditionally, the title to remain in plaintiff until the purchase-price should be fully paid. Such a sale is sanctioned by *Ballard v. Burgett*,* and *Austin v. Dye*.† There was nothing, therefore, in that portion of the contract, which would give to the creditors, rights superior to those of the plaintiff. But the contract between the plaintiff and his son, contemplated additional purchases by the son, and additions to the stock of goods, which were to become the property of the plaintiff as fast as purchased, upon like conditions. As to such new purchases, the rights of the creditors of Edward H., would be superior to the rights of the plaintiff, so long as the goods remained in the possession, and under the control of Edward H. But the plaintiff, under his contract, took possession of all the goods in his son's possession, nearly three weeks before the levy, and such act was acquiesced in by the son, who aided in taking an inventory of the property, and recognized the right of the plaintiff to hold the goods under the contract. In the absence of fraud, such conduct would vest the plaintiff with the title to the goods, and would deprive Edward H. and his creditors of any claim upon them in plaintiff's hands. The possession of plaintiff, under a claim of ownership, was therefore an important fact in this case, by which all questions were disposed of, except only, whether such possession and ownership were in bad faith, and fraudulent, as to the creditors of Edward H. That question was fully and fairly submitted to the jury by the learned judge, and the verdict has established that plaintiff's possession was not fraudulent, or in bad faith.

It does not seem material, how plaintiff obtained possession of the goods, so long as the contracts between himself and his son gave him the right of possession. The possession, if rightful by virtue of the contracts, was effectual as against the son or any one claiming under or through him, however acquired. The same is true of the son's acquiescence. He could not recover the goods of his father, because the father had the legal right to the possession, under the contracts with the son. An action, founded upon the manner in which the father gained possession, or the want of acquiescence by the son, must, for the reasons stated, have failed.

The plaintiff's title and possession are held to be honest and free

* 40 N. Y., 314.

† 46 N. Y., 500.

from fraud, by the verdict of the jury, as against the creditors of Edward H. That being so, no attack can be sustained by the creditors against the plaintiff, except upon proof showing that the plaintiff had no title, and that the title was still in his son. We have seen that the contracts between the plaintiff and his son, gave plaintiff the title to these goods, which was made effectual, in the absence of fraud, by reducing them to possession.

Many exceptions are taken in the case, but all of them cluster around, and are disposed of by, the principles above stated.

Believing that no error was committed upon the trial, to the prejudice of the defendant, the verdict must be sustained.

The motion for a new trial is therefore denied, and judgment ordered for the plaintiff on the verdict, with costs.

Present—MILLER, P. J., BOARDMAN and JAMES, JJ.

Motion for new trial denied. Judgment ordered for the plaintiff on the verdict, with costs.

JUD SMITH, SHERIFF, ETC., APPELLANT, v. WILLIAM T. POST, RESPONDENT.

Chattel mortgage — when fraud of mortgagor does not affect rights of mortgagees — given to two persons to secure separate debts — when void as to one mortgagee, and good as to the other.

Where property covered by a chattel mortgage is in the possession of a third person, an immediate delivery thereof is not necessary.

The mortgage provided that in case of default in payment, or in case the mortgagees should at any time deem themselves unsafe, they might take possession of the property and sell the same. *Held*, that this provision was for the benefit of the mortgagees, and authorized them to take possession when, in their judgment, they deemed it best for the safety of their demands so to do, and that no proof was required to show that they considered themselves unsafe, as the legal presumption would be that such was the fact, when possession was taken before the mortgage was due.

The fraud of the mortgagor will not affect the rights of the mortgagees to the property mortgaged, unless he was a party or privy to it, and received the mortgage with the intent to hinder, delay or defraud the creditors of the mortgagor.

Where a mortgage is made to two persons, to secure separate and distinct debts, the knowledge and fraudulent intent of one of them, will not affect the rights

therein of the other. The mortgage will be void as to the one and good as to the other.

Goodwin v. Kelly (42 Barb., 194) followed.

APPEAL from a judgment in favor of the defendant, entered upon the verdict of a jury, and from an order denying a motion for a new trial, made upon the judge's minutes.

The action was brought by the plaintiff to recover personal property, which he had levied upon by virtue of an execution against one Thomas Merritt, and which had been sold by virtue of a chattel mortgage in favor of the defendant and one Catharine McCutchen. The mortgage was executed July 30, 1869, and delivered soon afterward. On the fifth of August, the mortgage was filed, and the defendant claims that he took actual possession. The cause was tried at the Chemung Circuit, before Justice MURRAY and a jury, and resulted in a verdict in favor of the defendant.

The defendant interposed two defenses. First, he claimed title to the property, under the chattel mortgage; and second, he denied that he had interfered with the property in any way, and claimed, that, before it was attached for the claim under which the plaintiff sought to hold the property, and, to secure which, it was attached, he had released all his interest in it, to Mrs. McCutchen, and that the sale was by her alone.

The principal question litigated upon the trial, was the good faith of the mortgage. The evidence showed that in July, 1869, the said Merritt was the owner of a farm and of a large amount of personal property thereon, and that, on the twenty-ninth of that month, the wife of said Merritt, having learned that her husband was in Boston, in trouble and needing money, came with a neighbor to the defendant and wanted to borrow some money and give the farm as security. The defendant declined to loan money upon the farm, but offered to buy it, which offer was subsequently accepted. The defendant, having learned of the existence of several debts, in Elmira, against Merritt, and it being claimed that he owed his mother-in-law, Mrs. McCutchen, \$1,800, it was further agreed that the defendant should assume the payment of all the Elmira debts, provided that Merritt execute a chattel mortgage to the defendant and Mrs. McCutchen, upon a portion of the personal property on the place, to secure their respective debts.

Mrs. Merritt went to Boston and brought back the deed and chattel mortgage, executed by Merritt, and delivered them to the defendant. Various exceptions were taken, and decisions made on the trial, which are discussed in the opinion.

Erastus P. Hart, for the appellant.

D. B. Hill, for the respondent.

MILLER, P. J.:

The question whether there was an immediate delivery, and an actual and continued change of possession of the mortgaged property, was a question of fact, and properly submitted to the consideration of the jury, upon the trial. There was proof to show that an actual, formal possession was taken, and that the defendant assumed control, and gave directions concerning it, and exercised a general oversight over it. The question of fraud having been submitted to the jury, and they having found against the plaintiff, the verdict is conclusive on the point made.* It may also be remarked, that the mortgaged property being at the time in the possession of a third person, an immediate delivery was not necessary.† The provision in the mortgage, that in case of default in payment, or in case the mortgagees should, at any time, deem themselves unsafe, they might take possession of the property and sell the same, was for the benefit of the mortgagees, and authorized them to take possession, when there was a default, or when, in their judgment, they deemed it best for the safety of their demand; and no proof was required to show that they so considered themselves unsafe, as the legal presumption would be, that such was the fact, when possession was taken before it was due. Especially does such a presumption arise, when no distinct point was made upon the trial, that there was a failure of proofs in this respect.

There was, I think, no error in the charge of the judge, in holding, substantially, that the defendant was not, nor were his rights to the mortgaged property, affected by the fraud of the mortgagor, unless he was a party or privy to it, and received the mortgage, with the intent to hinder, delay, or defraud the creditor

* *Butler v. Miller*, 1 Com., 496.

† *Goodwin v. Kelly*, 43 Barb., 194.

of the mortgagor. And also, that to make the mortgage void, as to the defendant and Mrs. McCutchen both, they must have received the mortgage for the same fraudulent purpose, or, in effect, that even if Mrs. McCutchen knew of such fraudulent intent of the mortgagor, her knowledge could not affect the defendant, and he might be protected, while she would not. There appears to be no good reason why an innocent mortgagor should suffer for the fraudulent intent of his associate, of which he had no knowledge, and in which he did not participate. He stands in the same position, as if he had taken a separate mortgage to himself, and the fact that the same mortgage provides for his separate debt, does not infect the amount secured, with the fraud that taints the portion secured to another party. There are virtually two mortgagees instead of one, whose interests are distinct, and the fraud which vitiates the mortgage, relates to the substance and the subject-matter of the mortgage, and not to the parties. And even this general rule, as to the subject-matter, is not without exception, and it is held, that if part of a mortgage is proved to have been a subsisting debt, at the time of its execution, the mortgage is valid to the extent of such debt. * It may be valid as to part of the property described in it, and it is not rendered void, by reason of its professing to mortgage other property, as to which it is inoperative. † So long as there was no original intention of the mortgagor, to hinder, delay and defraud creditors, within *Russell v. Winne*, ‡ or a fraudulent purpose, it can be upheld, as a valid and lawful security. Although two parties are secured separately, in one instrument, it must be considered as a transfer, separate and distinct, which enables each one to hold the property independently of the other, in proportion to the debt secured. The same rules apply to conveyances of real estate; § also to the assignments of property. |

It is said that the defendant did not take the mortgage for any debt, past or present, due or owing to him, and was merely a trustee for Merritt, and the property mortgaged to secure debts which were named, and, in this view, was in the condition of an

* *Wescott v. Gunn*, 4 Duer., 107. § *Bump on Fraudulent Conveyances*, 472.

† *Gardner v. McEwen*, 19 N. Y., 123. | *Prince v. Shepard*, 9 Pick., 176.

‡ 37 N. Y., 591.

assignee, or trustee for the benefit of creditors, and his title was affected by the fraud of the mortgagor. I think that this position is erroneous, and the assumption of the payment of the debts by the defendant, rendered him liable for the same. It was, in fact, an absolute promise to pay, on his part. He was not to take the property, sell and dispose of the same, and apply the proceeds towards the payment of the debts, but was obligated to pay them, without regard to the property, or the amount realized upon any sale thereof. It was a promise made by an individual to a third person, for a valid consideration, to pay money to such person, by virtue of which, an action can be sustained by the latter, in his own name, against the promissor.* It matters not, that the defendant did not pay before the attachment was levied, and it is sufficient, I think, that he was liable to pay, to uphold the amount secured by the mortgage to him.

I think there was no error in the charge of the judge to the jury, that in case they found the mortgage valid, under the rules laid down by him, then the verdict should be for the defendant, without going further. The judge had presented a statement of the leading features of the case, and the first defense interposed, which was that the defendant and Mrs. McCutchen had a mortgage, executed upon this same property, under which he was protected in taking the property, if he took it at all, and I am unable to discover any ground, upon which it can fairly be claimed that this proposition was not a sound one. The argument of the plaintiff's counsel, as I understand it, is, that it mattered not whether the mortgage was valid or otherwise, if the defendant released all his right, or title, or interest, in the mortgaged property, under his mortgage, and gave it up to Mrs. McCutchen, and consented she might take it and dispose of it, without reference to the debt, and that his case was the same as if there was no mortgage at all. I see no good reason why the defendant could not justify himself, under his interest in the mortgage, if it was a valid one, as the judge charged; and the subsequent portions of the charge, were not inconsistent with this view, or liable to exception. Nor was there any error in any of the refusals to charge as requested.

*Lawrence v. Fox, 20 N. Y., 268; Hall v. Robbins, 61 Barb. 33; Hale v. Boardman, 27 Barb., 82.

There was no valid objection to the evidence given, as to the amount of the treasury check, payable to the order of Mrs. McCutchen, in the hands of Merritt, which was all that the judge allowed to stand as testimony, when the motion was first made to strike out the same, and the subsequent evidence given, relating to the same matter, was, I think, competent. But even if incompetent, the error was cured by the charge of the court to the jury, that there was no sufficient evidence of indebtedness in the case to Mrs. McCutchen.

The evidence of Thomas Merritt's declarations, as to what had been done with his property, was also competent, for the purpose of establishing a ratification of the act of his wife. It was also proper for the defendant's counsel to read the balance of the motion papers, and, as held by the judge, such portions of them, as would qualify and explain anything that had been read. The other questions made, and exceptions taken, do not require examination.

After a careful examination, I am satisfied that there was no error upon the trial, and that, therefore, a new trial must be denied, and the judgment and order affirmed, with costs.

WILLIAM T. POST, PLAINTIFF, v. FLAVEL H. DOREMUS,
SURVIVOR OF THEOBALD S. DOREMUS.

Undertaking on appeal—liability under Code, § 334—extra allowance—costs of appeals, from what orders, secured by the undertaking.

The plaintiff brought an action against one Hathorn, which resulted in a verdict for the defendant. Plaintiff appealed to the General Term, where a new trial was granted. Upon an appeal from the order of the General Term, granting the new trial, the defendant and another executed an undertaking, which provided, 1st. For the payment of all costs and damages which might be awarded against the appellant on said appeal, not exceeding \$500; 2d. For the amount directed to be paid if the judgment appealed from, or any part thereof, should be affirmed; and 3d. For the payment of all damages and costs which should be awarded against the appellant on said appeal. The Court of Appeals affirmed the order of the General Term, and ordered judgment absolute for the plaintiff.

Held, that the first part of the undertaking restricted the amount, secured by it, to a sum certain, which is specified; that the second was entirely inapplicable to the order appealed from, and should be considered stricken out as surplusage; that the third part was unrestricted in its terms, and, fairly interpreted, was

broad and comprehensive enough to embrace all costs and damages which might, finally, be awarded against the appellant, and necessarily included the full amount of the judgment awarded by the Court of Appeals.

The undertaking required to be given by section 334 of the Code, does not of itself stay the proceedings in the court below; and the only way in which they can be stayed, after an order for a new trial has been made, is by a motion directly to the court for that purpose, where the proper terms can be imposed as to security.

As the action of the plaintiff in accepting the undertaking in suit instead of proceeding with the case, was for the benefit of the appellant, who was thereby relieved from the necessity of making a motion to the court, it was *held*, that this furnished a sufficient consideration to support the undertaking.

At the time of entering the judgment in the original action, an extra allowance was granted to the plaintiff. *Held*, that he was entitled to recover the same from defendant in this action.

At the same time that the appeal was taken from the order granting a new trial, appeals were taken from two other orders in the action. *Held*, that the costs of those appeals were not included in the undertaking.

CASE submitted upon an agreed statement of facts.

The plaintiff brought an action in the Supreme Court against one Hathorn, impleaded with one Robertson, which resulted in a verdict for the defendant. A motion was made at Special Term for a new trial, which was denied, and, upon an appeal from the order to the General Term, it was reversed, and a new trial granted, with cost to abide the event. Hathorn appealed to the Court of Appeals, and filed a stipulation that if the order was affirmed, judgment absolute might be rendered against him, and, upon such appeal, filed an undertaking, which is as follows:

“IN THE COURT OF APPEALS.

WILLIAM T. POST, RESPONDENT, <i>against</i> JOHN P. HATHORN, IMPEADED WITH JOHN F. ROBERTSON, APPELLANT.	}	Undertaking.
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“Whereas, on the third Tuesday of November, 1867, in the Supreme Court, at the General Term of the sixth judicial district of the State of New York, an order was made reversing the order of the Special Term in this action (denying the plaintiff's motion for a new trial), and granting the said respondent's motion for a new trial.

"And the above-named appellant, feeling aggrieved thereby, intends to appeal therefrom to the Court of Appeals.

"Now, therefore, we Theron J. Doremus, of No. 1 Erie Buildings, Reade street, in the city of New York, and F. H. Doremus, of No. 7 Erie Buildings, Reade street, in said city, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal, not exceeding \$500; and do also undertake that if the said judgment, so appealed from, or any part thereof, be affirmed or the appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on said appeal.

"Dated *December 3, 1867.*

"THERON S. DOREMUS.

"F. HARRY DOREMUS."

To the said undertaking, was annexed an affidavit of each of the sureties, that he was a householder, and worth the sum of \$1,000, and the same was duly acknowledged.

The Court of Appeals affirmed the order, and judgment absolute was ordered in pursuance of the stipulation, with costs. The proceedings were remitted to the Supreme Court, where the plaintiff's damages were assessed, costs adjusted upon notice, and without objection, and judgment entered, on the 11th day of August, 1873, for \$4,887.02, damages and costs. The plaintiff proposed to move for an extra allowance, and Hathorn's attorney stipulated that it should be granted, and it was included in the costs.

During the litigation, two several orders were made at Special Term, in relation to matters of practice in the case, which were appealed from to the General Term by Hathorn, and, being affirmed, they were appealed from to the Court of Appeals, which appeals were heard at the same time as the appeal from the order granting a new trial, and the orders affirmed, with costs. The defendant, in the case submitted, was the survivor of the two sureties named in the undertaking.

D. B. Hill, for the plaintiff, cited *Rogers v. Kneeland* (10 Wend., 218); *Wiser v. Blachly* (1 John. Ch., 607); *Farley v. McConnell* (52 N. Y., 630); *Ex parte Eastabrooks* (5 Cow., 27); *McMahon v. Allen* (22 How., 193); *Valton v. The Nat. Loan Fund Life As.* (19 How., 515); *Clark v. Brooks* (2 Abb. [N. S.], 399); *Tiers v. Carnahan* (3 Abb., 69); *Von Keller v. Schulting* (45 How., 139); *Beals v. Benjamin* (29 How., 101).

C. M. Marsh, for the defendant, cited *Griswold v. Fowler* (15 Abb., 368, note); *Thompson v. Blanchard* (3 N. Y., 335); *Halsey v. Flint* (15 Abb. Pr., 367); *Hall v. Oushing* (9 Pick., 395); *Poppenhusen v. Seeley* (41 Barb., 450); *S. C.* (3 Keyes, 150); *Onderdonk v. Emmons* (9 Abb., 187).

MILLER, P. J.:

The undertaking executed by the defendants, upon the appeal taken to the Court of Appeals, provided, first, for the payment of all costs and damages which might be awarded against the appellant on said appeal, not exceeding \$500; second, for the amount directed to be paid, if the judgment appealed from or any part thereof be affirmed, or the appeal be dismissed, or the part of such amount as to which the said judgment should be affirmed, if it be affirmed only in part; and third, to pay all damages and costs which shall be awarded against the appellant on said appeal. The first part restricts the amount to a sum certain, which is specified. The second provides for the payment of a judgment, or such part thereof as may be affirmed, when there was no judgment appealed from, and is entirely inapplicable to the order from which the appeal was taken. It may, I think, be regarded as redundant and superfluous, and considered stricken out as surplusage. The third part is unrestricted in its terms, and, fairly interpreted, includes all costs and damages arising to the plaintiff by reason of the appeal. This is a legitimate and rational construction from the terms and language of the undertaking, and I think, in judgment of law, is contained in it.*

It may, I think, be considered either as a continuation of the first part, which extends the obligation beyond the \$500 therein

* *Rogers v. Kneeland*, 10 Wend., 218.

specified, or as an independent and distinct clause, which has precisely the same effect. In either point of view, it is, I think, broad and comprehensive enough, to embrace all costs and damages, which might finally be awarded against the appellant, which necessarily would include the full amount of the judgment awarded by the Court of Appeals. It is no objection to an undertaking, that the penalty is for more than the amount required,* nor, in my opinion, that it is broader in its terms, than was actually necessary. Hence it cannot be urged that this instrument was too comprehensive, and, unless it was not embraced within some rule of law, it cannot, I think, be avoided.

It is objected, that it was for more than was required by section 334 of the Code, which limits such an undertaking to the costs of the appeal, not exceeding \$500, and which is the only undertaking required upon such an appeal. It is true, that the first part of the undertaking embraces an appeal from an order, under this section, but it does not of itself stay the proceedings in the court below; and the only way in which the proceedings in the court below can be stayed, after an order for a new trial has been made, is by a motion directly to the court, for that purpose, where the proper terms can be imposed as to security, so as to protect the respondent against loss, if the Court of Appeals should have affirmed the order, or, as in this case, directed a judgment in his favor.† The undertaking, therefore, under section 334, would not have stayed the plaintiff's proceedings, and the plaintiff would have been authorized to disregard the appeal, and could have proceeded, under the order granting a new trial, the same as if no appeal had been taken. No motion appears to have been made in the case, or any order specifying the terms on which a stay would be granted, but the bond was executed voluntarily, and perhaps for the very purpose of rendering any such motion unnecessary. It contained a provision, which, I think, covered all costs and damages, and was amply sufficient for such a purpose. It was all which could have been required, and no further proceedings were taken by the plaintiff in the court below, after it was executed, until the judgment of the Court of Appeals, some six years thereafter. Although the undertaking was not given in pursuance of an order of the

* *Ex parte Eastabrooks*, 5 Cow., 27. † See *McMahon v. Allen*, 22 How., 193.

court, yet, inasmuch as it was for the benefit of the appellant, and he chose thus to avoid the necessity of making a motion for a stay, and the plaintiff accepted the undertaking instead of proceeding with the case, as he had a perfect right to do, I am not able to discover any valid, legal ground which will relieve the defendant from liability. It is no answer to say that the undertaking derives its entire force from the statute under which it is given, because there is no provision of the Code, which provides distinctly for an undertaking upon a stay, or the mode or terms by which proceedings shall be stayed by the court. It is enough that it included all that it is required to cover—the final judgment in the case—to render it valid and binding.

The provision of section 341 of the Code, that an undertaking shall be of no effect, unless it be accompanied by an affidavit of the sureties that they are each worth double the amount, cannot affect the validity of the undertaking, because it has been strictly carried out by the affidavit of the sureties, so far as any amount is specified.

As the undertaking in question, clearly included the judgment absolute rendered by the Court of Appeals, under section 11, subdivision 2, of the Code, against the appellant, upon affirming an order, the plaintiff is entitled to a judgment for that amount, with legal costs. As to the costs, I think that the plaintiff is entitled to the extra allowance.* The costs, on the other appeals from orders, are not included in the undertaking, as they are neither costs nor damages, awarded against the appellant, upon the appeal.

As the case stands, the plaintiff is entitled to a judgment for the full amount claimed, deducting \$180, for costs on affirmance of two orders, in the Court of Appeals, with costs.

Present—MILLER, P. J., BOARDMAN and JAMES, JJ.

JAMES, J., dissented.

Judgment ordered for plaintiff, with costs.

* See *Beals v. Benjamin*, 29 How., 101; *Clarke v. The City of Rochester*, id., 97.

MEMORANDA
OF
CASES NOT REPORTED IN FULL.

HENRY M. TRAIN, APPELLANT, *v.* THE HOLLAND PURCHASE INSURANCE COMPANY, RESPONDENT.

Policy of insurance — delivery of, by agent after loss — Premium not paid — effect of.

Plaintiff applied to defendant's agents to change his insurance. The agents agreed to obtain what they could, on the return of plaintiff's policy of insurance in the Andes Insurance Company, and to give plaintiff credit for this amount on insurance in another company, the defendant not being distinctly named as such other company, and neither party having in view the continuance of both policies at the same time.

The Andes company refused to pay the return premium, and the plaintiff was informed of this. He said nothing more about a new insurance, and gave notice of loss to the Andes company. No rate of insurance was agreed upon between the plaintiff and defendant's agents, nor did plaintiff agree to accept the policy of insurance, which was forwarded to defendant's agents at their request. After the fire, the policy of insurance was received by the plaintiff, but no premium was paid defendant's agents. The policy contained the following condition: "If the premium of insurance shall not have been paid such insurance shall be void." *Held*, that the proposal to insure, came from the company, by their sending the insurance policy to their agents; that such proposal had never been accepted by plaintiff by a compliance with its terms or conditions, the policy not having been delivered and accepted, and no premium having been paid; that the delivery of the policy to the plaintiff, after the fire had taken place, was unauthorized, and did not create a contract of insurance. Even if it were otherwise, the premium of insurance not having been paid, the insurance was void, according to the terms of the policy.

APPEAL from a judgment at the Circuit, dismissing plaintiff's complaint.

At the close of the testimony, the defendant moved for a dismissal of the complaint, and the motion was granted. From the judgment entered, the plaintiff appealed.

J. A. Vance, for the appellant.

George Bowen, for the respondent.

Opinion by MILLER, P. J.

Present—MILLER, P. J., and BOARDMAN, J.

Judgment affirmed.

PETER PHILLIP, RESPONDENT, v. JOSETTE GALLANT,
APPELLANT.

Contract—misunderstanding of provisions of, by one party to— not sufficient to avoid it— What authorizes reformation of written instrument.

The defendant, who did not understand English perfectly, was informed of the contents of a contract by a scrivener's clerk, who was present at the time the contract was read and executed. In an action brought by the assignee of the other party, to recover the amount due on the contract, she set up as a defense that she had been misinformed as to the provisions of the contract. It appeared that the contract was carefully read over twice to the defendant, and was executed by the parties in good faith. *Held*, that the plaintiff was not responsible for the error or ignorance of the interpreter; that the defendant was in fault for trusting to an incompetent person to explain the agreement, and was not entitled to claim that there was no valid contract.

To authorize a reformation of a written instrument, solemnly executed, there must not only be a plain mistake, but it must be shown that the part omitted or inserted in the same, was omitted or inserted, contrary to the intention of the parties, and under a mutual mistake.*

Beckwith & Dobie, for the appellant.

H. E. Barnard, for the respondent.

Opinion by MILLER, P. J.

Present—MILLER, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs.

* *Nevius v. Dunlap*, 33 N. Y., 376.

MILES KENT, ALBERT C. ROSE AND AMBROSE KENT,
APPELLANTS, *v.* HECTOR S. KENT AND OTHERS, RESPONDENTS.

Judgment against administrator — not evidence against heirs and grantees — Statute of frauds.

A judgment recovered against an administrator is not evidence of a debt due by the intestate, as against his heirs or grantees.

An agreement by which A. is to perform work for B., for which, payment is to be made after the death of B., is valid under the statute of frauds.

Dresser v. Dresser (35 Barb., 573) followed.

APPEAL from a judgment dismissing plaintiffs' complaint.

John W. Dininny, for the appellants.

John J. Van Allen, for the respondents.

Opinion by BOARDMAN, J.

Present—MILLER, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs.

THE PEOPLE EX REL. ASA FOOTE *v.* RALPH S. DEWEY.

Fence viewers — question of jurisdiction only, considered on certiorari — presumption against jurisdiction, not indulged — proportion of fence to be maintained by each party.

The provisions of the Revised Statutes * make the decision of the fence viewers final, and, on certiorari, the court is restricted to the consideration of the question of jurisdiction, and will not presume facts to exist, which take away their jurisdiction. The law † does not require each party to build one-half the fence, but a "just and equal proportion of the division fence;" ‡ that is, just and equal with reference to the cost of construction and maintenance.

CERTIORARI to the fence viewers and town clerk of the town of

* 1 R. S., 320, § 35.

† 1 R. S., p. 353, as amended by chap. 540 of the Laws of 1866.

‡ Section 80, *supra*; see also sections 81, 82, 43.

Sidney, Delaware county, to review proceedings for the decision of a line between relator and defendant Dewey.

Belknap & Edson, for the relator.

F. B. Arnold, for the defendant.

Opinion by BOARDMAN, J.

Present—MILLER, P. J., BOARDMAN and JAMES, JJ.

Proceedings affirmed, with costs.

THE PEOPLE EX REL. HARVEY MILLER AND OTHERS, v.
JAMES R. COMES AND OTHERS, REFEREES.

CERTIORARI to review the proceedings of referees, appointed by the county judge of Madison county, affirming the order of commissioners of highways, laying out a highway.

The only question discussed by the court, was, whether or not the road was laid out through the barn, court or door-yard of the relator, without his consent, in violation of the statute which declares that no road "shall be laid out through any buildings, or any fixtures or erections for the purposes of trade or manufactures; or any yards or inclosures necessary to the use and enjoyment thereof, without the consent of the owner." *

The court, after citing with approval the rule laid down by Chancellor WALWORTH, in *Lansing v. Caswell*, † decided that the evidence in the case, was not sufficient to authorize a reversal of the order of the referees, and affirmed the proceedings.

B. T. Chapman, for the relator.

M. J. Shoecraft, for the respondent.

Opinion by MILLER, P. J.

Present—MILLER, P. J., BOARDMAN and JAMES, JJ.

Proceedings affirmed, with costs.

* 1 Rev. St., 514, § 57.

† 4 Paige, 519-522.

Two Cases.

GEORGE E. MORSE, ADMINISTRATOR, ETC., APPELLANT, v.
SAMUEL WHITE AND OTHERS, RESPONDENTS.

SAMUEL WHITE, RESPONDENT, v. GEORGE E. MORSE,
ADMINISTRATOR, ETC., AND OTHERS, APPELLANTS.

APPEALS from judgments in favor of the respondents, entered upon the report of a referee.

The following extract from the careful and exhaustive opinion of Mr. Justice BOOKES, shows the character of the questions passed upon by the court: "It has not been found necessary to cite authorities, or even here to refer, by way of particular notice and comment, to the many cases cited in the elaborate and able briefs submitted by the learned counsel who argued the appeal. The difficulties in the case have arisen mainly, if not entirely, out of a disagreement as to the facts. If the facts certified by the referee be well proved, the case is relieved, as it seems to me, from all perplexity on the law."

Opinion by BOOKES, J.

Present—MILLER, P. J., BOOKES and BOARDMAN, JJ.

Judgments affirmed, with costs.

Cases
DETERMINED IN THE
FOURTH DEPARTMENT
AT
GENERAL TERM,
June, 1874.

**JOSEPH FIRMENICH, APPELLANT, v. LORENZO J. BOVEE
AND LEWIS KELSEY, RESPONDENTS.**

Attorney — Lien of, for costs — when subject to right of set-off by opposite party.

The lien of an attorney for his costs, on the judgment recovered, is subject to the right of set-off, in a proper action against the client for that purpose. When, however, the client assigns the judgment, or the costs accrued and to accrue in the action, to his attorney, as security for his costs, the opposite party loses his right of set-off, as the assignment becomes operative before the right of set-off attaches.

The right of set-off does not attach until the judgment sought to be set off has been actually recovered.

APPEAL from an order of Special Term, overruling a demurrer to defendants' answer.

John H. Vought and Albert Sherwood, who were copartners in business, on October 26th, 1866, recovered a judgment against the defendant, Bovee, for \$2,480.35, damages and costs. Sherwood died, and thereafter, and on August 5, 1872, Vought, as survivor, assigned the judgment to the plaintiff, Joseph Firmenich. On the 23d day of June, 1872, the defendant, Bovee, recovered a judgment against Firmenich, the plaintiff, for \$346.57, damages and costs. Firmenich appealed from the judgment to the Genera-

Term, where it was affirmed, and judgment entered for Bovee for \$53.91, costs of appeal.

The complaint alleges the insolvency of Bovee, and asks that the judgments be set off against each other. It further alleges that Lewis Kelsey claims some ownership in the judgment in favor of the defendant, Bovee, and against the plaintiff, but denies that he has any ownership or interest therein.

The answer, among other things, sets forth, first, that on the recovery by Bovee of the judgment of June 21, 1872, it was agreed between him and Heddon, his attorney, that Heddon should have a lien on such judgment, for costs, disbursements and services in said action, for \$150, and that one Randolph Ballard, who acted as counsel for Bovee on the trial, should have a lien thereon for \$20, for his services; and that on July 13, 1872, for a valuable consideration, Bovee sold the judgment, subject to the liens aforesaid, to the defendant, Lewis Kelsey. Second, that on the appeal, the judgment was for costs and disbursements, which had been wholly earned and made by Thomas P. Heddon, Bovee's attorney. The plaintiff demurred to the defense, first above stated, on the ground that it did not state facts constituting a defense to the said action.

The court, at Special Term, gave judgment for the defendant on the demurrer, with leave to the plaintiff to withdraw it.

Hamilton R. Squier, for the appellant.

T. P. Heddon, for the respondents.

MULLIN, P. J. :

On the 26th of October, 1866, Albert Sherwood and another recovered a judgment in this court against the above-named defendant, for the sum of \$2,354.11 damages, and \$126.24, costs, in an action on contract. On the 5th August, 1872, Sherwood, one of the plaintiffs in said judgment, died; and Vought, the survivor of said plaintiff, for a valuable consideration, sold and assigned said judgment to the above-named plaintiff. Execution was issued on said judgment and returned wholly unsatisfied. After plaintiff became the owner of said judgment, and on the 15th August, 1872,

the defendant was notified of the assignment of said judgment to the plaintiff. On the 21st June, 1872, the defendant recovered a judgment in this court against the plaintiff, in an action on contract, for the sum of \$346.57, for damages and costs. The plaintiff appealed from said judgment to the General Term, and that court affirmed it, and judgment of affirmance was entered on the 17th January, 1873, with \$53.91 costs.

This action was brought to compel a set-off of the judgment recovered by defendant, against the judgment recovered by the plaintiff, upon the ground of the total insolvency of Bovee. The plaintiff alleged in his complaint, that Lewis Kelsey claimed ownership of the judgment in favor of Bovee against the plaintiff, or some interest therein, which claim is unfounded. Kelsey is made a party defendant.

- The answer of the defendants contains, first, a general denial of the matters charged in the complaint.

For a further defense, it is alleged that Thomas P. Heddon was the attorney for the defendant, Bovee, in the action in favor of defendant against the plaintiff, and immediately on the recovery of said judgment, it was agreed between Bovee and Heddon, that the latter should have a lien on said judgment for his costs, disbursements and services in said action, for the sum of \$150, which lien still subsists, and that no part of such costs, etc., have been paid. That Bovee agreed with one Ballard, an attorney of this court, that he should have a lien on said judgment for twenty dollars, counsel fees, for aiding in the trial of said cause, which lien still subsists. That on the 13th of July, 1872, Bovee, for a valuable consideration, sold and assigned said judgment to the defendant, Kelsey, subject to the liens aforesaid, and he is now the legal owner and holder thereof and entitled to the money due thereon.

The third defense is, that Heddon was attorney for Bovee in the appeal by plaintiff to the General Term, from the judgment recovered by Bovee against him, and thus the judgment for costs and disbursements in that case, belonged wholly to Heddon, he having earned all of the costs and made all the disbursements therein; and that no part of said costs or disbursements have been paid said Heddon, and he is entitled to the same.

To the second defense, the plaintiff demurs, on the ground that

it does not state facts sufficient to constitute a defense. The Special Term ordered judgment for defendants, on the demurrer, with costs, with leave to plaintiff to withdraw the demurrer.

In the case of *Nicoll v. Nicoll*,* a bill was filed in chancery to set off a judgment in favor of the plaintiff, and to restrain defendant from enforcing his judgment. An injunction issued, which was vacated by the vice-chancellor, on the application of the defendant's attorney in the action at law in which the judgment was recovered, on the ground that he had a lien thereon for his costs. The chancellor affirmed the order of the vice-chancellor. The Court of Errors reversed the order of the chancellor and remitted the proceedings, with directions to allow the set-off. COWEN, J., delivered the opinion of the court. After stating the practice in the various courts in England and in this State, as to recognizing and enforcing the lien of an attorney on a judgment recovered by him, for his costs, and that, on motion to set off judgments against each other, it was discretionary whether to grant or refuse the relief asked, he says: "But when we come to a bill filed or a trial at law, there is no discretion. On motion the courts proceed without the statute; on a bill filed or a trial at law, they are within it, and must obey it. No authority can be produced, where the attorney's lien was ever recognized on a trial at law as barring a set-off, the right to which would be otherwise perfect * * * No case can be produced, where on a bill filed this lien has been let in to obstruct a set-off, until *Grisley v. Garrison*, decided by the present chancellor. * * * Rules of practice are many times arbitrary, but when a statute comes in, there is a common principle by which all courts must abide; and which, I think, has been departed from by this decree."

An attorney, recovering a judgment, has, by law, a lien upon it for his costs.† An express agreement that he shall have a lien, is of no greater force than the lien given by law, and hence the lien, in whichever way it is created, is subject to the right of set-off, in a proper action against the client for that purpose. When, however, the client assigns the judgment, or the costs accrued, and to accrue, in the action, to his attorney as security for his costs, the opposite party loses his right of set-off, as the assignment becomes opera-

* 16 Wend., 446. † *Rooney v. Second Avenue R. R. Co.*, 18 N. Y., 368.

tive before the right of set-off attaches.* It follows that the lien of Heddon and Ballard cannot prevent the set-off of the judgment, if otherwise admissible. The right of set-off does not attach, until a judgment, sought to be set off, has been actually recovered. The judgment in favor of defendant against plaintiff, was recovered the 21st June, 1872, but he could not have a right of set-off of the judgment against defendant, until he got an assignment of it, on the 5th August, 1872. The assignment of the judgment by Bovee to Kelsey, was on 13th July, 1872, and before plaintiff had any right to demand a set-off. Unless, therefore, a notice from Kelsey to plaintiff, of the assignment of the judgment against him, was essential, in order to defeat plaintiff's right of set-off, the plaintiff had no such right, and the demurrer was properly overruled. Notice of the assignment of the judgment against Bovee to the plaintiff, is alleged to have been known to Bovee. But notice could not have been given to plaintiff, of the assignment of the judgment of Bovee against plaintiff, as plaintiff was an assignee of the judgment, and the fact of the assignment not disclosed.

The plaintiffs in the judgment against Bovee, had no right of offset, and hence, plaintiff acquired none from them. Having had none at the time of the assignment by Bovee to Kelsey, that assignment was a bar to the right of offset of the judgment for damages and costs.

But if I am right in holding that the plaintiff had a right to a set-off of the judgment in favor of Bovee for costs, notwithstanding the lien of his attorneys, the order must be reversed as to that item, and affirmed as to the judgment assigned to Kelsey, without costs of the appeal to either party.

Ordered accordingly.

* Perry v. Chester, 53 N. Y., 240.

GEORGE VAN ALSTYNE, RESPONDENT, v. SAMUEL E.
NORTON AND CARSO CRANE, APPELLANTS.*Answer — demurrer to — when overruled.*

Where an answer in an action for fraud, contains a denial of the fraud, and a statement of facts which tend to prove the absence of an intent to defraud, a demurrer to it should be overruled, even though the pleading is wholly defective, and ought on motion to be stricken out.

APPEAL from an order, sustaining a demurrer to a portion of the defendants' answer. The facts appear in the opinion.

William H. Adams, for the appellants.

J. W. Stebbins, for the respondent.

MULLIN, P. J.:

This action is brought to recover of the defendants, who were bankers at Phelps, in the county of Ontario, \$770, alleged to have been obtained from the plaintiff, by false and fraudulent representations. The facts alleged in the complaint, are, that on the 6th January, 1872, the day the money was received by defendants from the plaintiff, they were insolvent, and proceedings were pending against them, instituted by their creditors, to have them declared bankrupts, in which proceedings an injunction had been issued by the Court in Bankruptcy, restraining them from doing any further business. The defendants concealed these facts, and opened their banking-house, on said sixth of January, and continued business as usual, with intent to cheat and defraud their creditors. The plaintiff, relying upon their appearances, and in ignorance of their condition, deposited with them \$770, and received from them a draft on Henry Clews & Co., of New York, for that sum. It is further alleged, that defendants had, at that time, no funds in the hands of Clews & Co. The draft was presented to Clews & Co., and payment refused.

The defendants put in an answer containing two defenses. One, a denial of most of the facts alleged in the complaint; the other, after admitting the receipt of money from plaintiff, and the delivery

of the draft, alleges that, when the draft was delivered to plaintiff, the defendants had on deposit with Clews & Co., funds or securities, against which they had been accustomed and permitted to draw, to an amount much larger than that called for by the draft; that plaintiff or his transferees held said draft, and it was not presented until a number of days after it was drawn, and that drafts drawn subsequent to that of the plaintiff, were duly paid. It is further alleged, that the proceedings in bankruptcy were commenced against them, on or about the sixth of January, by the service of an order to show cause and an injunction; that the service was made by a young man, who stated that the proceedings had been instituted for the purpose of bringing about the consummation of an agreement between defendants and their creditors, to extend time for payment of their liabilities, and requesting defendants to go to Syracuse the following Monday, and an arrangement would be completed, by which the proceedings in bankruptcy would be terminated; that defendants went to Syracuse, leaving the sons of defendant Norton, in charge of the bank, instructing them to open the bank, but not to transact any business, or, if any was transacted, to keep it separate, so that it could be canceled in the event that an arrangement was not completed at Syracuse; that a meeting was held, and an agreement prepared and signed by most of defendants' creditors; and a full settlement was considered so certain by Norton and the creditors, that, by the advice and consent of a number of his creditors, he, Norton, returned home and continued business as before, until and including the thirteenth January, when negotiations for a settlement suddenly terminated, and the bank was closed. That the receipt of the plaintiff's money and the sale of the draft were in good faith.

Subsequently, a petition, setting forth the facts, was presented to the Court in Bankruptcy, and an order was made, authorizing the assignee to pay to all persons being creditors after the sixth of January, upon their proving their debts and accepting the same in satisfaction of their claims.

The plaintiff demurred to this defense, as not constituting a defense to the action. The Special Term sustained the demurrer, and gave leave to defendants to answer within twenty days, on payment of costs. From this order, the defendants appeal.

In stating a cause of action or defense in a pleading, facts, and not the evidence of facts, must be set forth.* This was the rule at common law, and it is the rule that common sense requires to be applied, in determining the sufficiency of a pleading.

The ground on which a recovery is sought in this action, is fraud; and the facts constituting the fraud, are alleged in the complaint. A denial of the fraud, as charged, puts the plaintiff on proof of it, and entitles the defendants to prove all such facts as they are able to produce, disproving the fraud charged.

In *Moak's Van Santvoord's Pleadings*,† it is said, there are matters of defense that need not be set up in the answer, but may be introduced under a mere denial, as, for example, matters which go to the essence of the cause of action or contract, showing that no sufficient contract in fact was ever made, or no cause of action ever existed, and, generally, all such matters as go to disprove any material allegation in the complaint.

There is no doubt that the matters set up in the defense demurred to, could have been proved under the denial in the first defense.

At common law, almost all defenses were admissible in the action of assumpsit, and in case for torts, under the plea of the general issue. But the defendant was nevertheless at liberty to plead specially any matters of defense, not amounting to the general issue, that admitted that a contract, for example, was made, but that it was void, or voidable, for any cause which, in law, rendered it void or voidable.‡ It is not necessary to consider whether such a mode of pleading is, or is not, admissible under the Code. Certain it is, that a defense, denying fraud, which is the gravamen of this complaint, amounts to a denial of the whole cause of action, and would not have been admissible as a special plea.

There is a constantly increasing tendency to prolixity in pleadings, and, when to this mischief is added that of setting up in answers, matters wholly unnecessary, thereby increasing largely the costs to suitors and the labors of the court, it is time the practice was stopped, and counsel required to conform to the rules of pleading, which would render impossible these abuses.

* *Boyce v. Brown*, 7 Barb., 80; *Russell v. Clapp*, 7 id., 482; *Pattison v. Taylor*, 8 id., 250; *Talman v. The Rochester City Bank*, 18 Barb., 123.

† 8 Ed., 507.

‡ 1 Chitty Pl., 474.

I do not propose to affirm the order of the Special Term on this ground; and perhaps the defects in the pleading cannot be reached by demurrer. I shall not consider that question. The defense was demurred to, because it did not constitute a defense to the action. The defense is a denial of the fraud charged, and a statement of facts which tend to prove the absence of intent to defraud. These allegations, if established by evidence, would be a defense to the action, assuming them to be well pleaded. The court could consider no facts, other than those stated in the part of the answer demurred to, and which were admitted by the demurrer. He however goes back to the complaint, and assumes the facts, therein stated, to be true. He comes to the conclusion that the defendants were, upon the complaint and answer, guilty of fraud. This I think the court below had no right to do.

While I entertain no doubt that the pleading demurred to, is wholly defective, and ought to be stricken out, yet, I think it constitutes a defense to the action. The order of the Special Term should be reversed.

Order reversed.

FRANKLIN A. SLOAN, PLAINTIFF, v. THE NEW YORK
CENTRAL AND HUDSON RIVER RAILROAD COM-
PANY, DEFENDANT.

*Common carrier — Negligence — Right of husband to recover for injuries to wife —
Excessive damages.*

Where a wife is injured by the negligence of a common carrier of passengers, the husband is entitled to recover for the loss of her services resulting therefrom.

Proof of her pain and suffering is admissible, to prove the extent of the injury and the duration of the loss of service.

In an action of *tort*, the court cannot reduce the verdict of a jury, because it is deemed excessive. The only remedy, in such a case, is to set it aside and order a new trial.

Motion for a new trial, on exceptions ordered to be heard is the first instance at General Term.

The plaintiff's wife was injured while riding in the defendant's

cars; and, for the loss of her services occasioned thereby, the plaintiff brought this action.

After the opening of the cause at the trial, the defendant moved for a nonsuit, on the ground that the plaintiff's wife had recovered a judgment in the Supreme Court for the sum of \$14,000, for the same injury to her, described in the pleadings in this cause, which judgment had been paid. The motion was opposed on the ground that the plaintiff was entitled to a separate action for his damages.

The court denied the motion, and the defendant excepted.

The defendant's counsel asked the court to charge, that, "under the recent acts of the legislature, the wife alone can maintain an action for her own injuries, and all the consequences to her in all relations, as well to her husband and children, as to herself."

The court declined to so charge, remarking: "I hold that the wife may sustain an action for her personal injuries of a physical character, but not in regard to her husband's injury in the loss of her services."

The defendant excepted.

Defendant further requested the court to charge, that, "in so far as the consequences to her are shared by her husband, the legislature has given us no dividing line by which to distinguish what is recoverable by her, and what by him, and the jury, having the fact of the former recovery by her, are bound to render their verdict for the defendant."

The court refused the request, remarking, in reference to it, that "the wife is not entitled to recover anything that belongs to the husband; what particularly relates to the husband can be recovered by him; and the husband cannot recover anything that belongs to the wife."

The defendant excepted.

The defendant then asked the court to charge, that "the wife has a right under our laws to retain and enjoy the commercial value of her own services, with or without the consent of her husband, and he has no right to compel such services for his own benefit, or to recover here for their value."

The court declined to so charge, and said that "the proposition has nothing to do with this case." The defendant excepted.

The jury found a verdict of \$10,500 for the plaintiff.

Thereupon, the defendant moved to set aside the verdict, on the grounds that it was contrary to the evidence; that the evidence was insufficient; and that the damages were excessive.

The motion was denied, and the defendant excepted.

The exceptions were ordered to be heard, in the first instance, at the General Term.

John H. Martindale, for the plaintiff.

James R. Coa, for the defendant.

MULLIN, P. J.:

The Court of Appeals, in the case of *Filer v. The N. Y. Central R. R. Co.*,* decided that a husband is entitled to recover for the loss of service of his wife, resulting from injuries caused by the negligence of a carrier of passengers. This question is therefore at rest, and cannot be permitted to be again discussed. It is doubtless true, that a husband is not entitled to recover for the pain and suffering endured by his wife, but proof of this pain and suffering is, or may be, not unfrequently admissible, to prove the extent of the injury and the consequent duration of the loss of service.

The court cannot, in an action of *tort*, reduce the verdict of a jury, because it is deemed excessive. The only remedy in such a case, is to set it aside and order a new trial. The damages awarded by the jury are large, but not excessive. It is impossible to lay down any rule, by which to determine when a verdict is excessive. Every case must be decided upon its own facts, and the jury are much the best judges of what amount of damages will be given to the injured party in redress for the wrong suffered, and, unless it is so large as to excite suspicion at its injustice, the court ought not to interfere.

The wife of the plaintiff was thirty-two years of age at the time of the injury. If the plaintiff's wife should live until she was of the age of three score years and ten, the plaintiff would receive her services for thirty-eight years, if she retained her mental and physical powers; and her services in the home of him and his

* 40 N. Y., 42. [See, also, *Brooks v. Schwerin*, 54 N. Y., 343.—Rep.]

household, would not be extravagantly paid, by an allowance of \$500 per year, including her support. It is true that a servant could be employed for a much smaller sum, but the services of the hireling would fall far short of being of the value of those of an affectionate, intelligent and prudent wife. By the annuity tables, her life would be estimated as continuing for about twelve years. This verdict would allow the husband \$1,000 per year, out of which he must support her, and furnish her such care and assistance, and medical aid, as she may require, and be deprived wholly of any services from her. I cannot, in view of these considerations, say that the jury have awarded the plaintiff an unreasonable measure of damages.

This case is one of several, to which my attention has been recently drawn, in which the jury, at a second trial, have awarded a much larger amount of damages than upon the first, and it is becoming quite important to defendants, to ascertain what induces this action on the part of juries. Does the resistance of defendants to a recovery, by repeated appeals, excite the prejudices of the jury, and lead them to punish the offender by an increase of the verdict? If this should prove to be the explanation, it would be a new and alarming phase of trial by jury, and cannot fail to bring it into disrepute. It is unnecessary to say that a jury have no right to inquire into the character, condition or motives of a defendant, in an action before them, unless it comes before them legitimately on the trial.

The court cannot assume that the jury have violated their duty, because, in a few instances, the verdict on a second trial is larger than upon the first, even when the evidence in each is substantially the same; but it behooves the court to scrutinize the action of juries in cases of *tort*, when satisfied that injustice has been done, to protect defendants against it.

I do not think the ruling on the trial, or the charge of the court, makes it proper for us to set aside the verdict.

A new trial is denied, and judgment ordered for the plaintiff on the verdict.

New trial denied, and judgment ordered for plaintiff.

THE PEOPLE EX REL. SAMUEL TOMPKINS v. WILLIAM
LANDRETH AND OTHERS, COMMISSIONERS OF HIGHWAYS OF
THE TOWN OF NIAGARA, AND OTHERS.

*Commissioners of highways—Certiorari to review proceedings of—when quashed—
Right of one whose land is taken, to act as commissioner to assess damages.*

Where nearly two years had elapsed since the filing of an order of the commissioners of highways laying out a road, and where the report of the commissioners appointed to assess the damages of those whose lands were taken had been filed, and such damages had been assessed upon the town and paid over to the commissioners of highways,—*held*, that the court would, in its discretion, quash a *certiorari*, issued to review such order.

Seemle, that a commissioner of highways is not disqualified, because he owns lands, over which he unites with other commissioners in laying out a road.

CERTIORARI to review proceedings of the commissioners of highways, of the town of Niagara, in the county of Niagara, and of the commissioners for assessing damages for the laying out the same.

Two applications were made to the commissioners of said town, to lay out a road. On the 25th March, 1872, the said commissioners made an order, laying out said road, and the order was filed in the town clerk's office, on the same day. The commissioners applied to the County Court, for the appointment of commissioners, to assess the damages of the owners of the land taken for said highway. Commissioners were appointed for that purpose, on the 10th day of March, 1873. On the 12th August, 1873, said commissioners, after hearing the parties in interest, made and filed their award of the damages of the several owners. On the 2d January, 1874, the said commissioners filed in the town clerk's office, what they call an amended appraisal, made necessary, as they claim, by reason of one of the persons, to whom damages were awarded, having died before the first appraisal was made, and the land, on account of which the damages were assessed, belonged to the heir-at-law of such deceased person. The commissioners of highways further return, that the supervisors assessed said damages on the town of Niagara, in the fall of 1873, and directed the same to be

paid to the commissioners of highways, and that the said moneys have been collected and paid over, accordingly.

Piper & Porter, for the relator.

H. N. Griffith, for the defendants.

MULLIN, P. J.:

The relator seeks to review, not only the proceedings of the commissioners to assess damages, but also, those of the commissioners of highways, in laying out the road. The order laying out the road was recorded and filed in March, 1872. Nearly two years had elapsed from the filing of the order, before the writ was applied for, a delay which, under the circumstances of this case, makes it proper for us to quash the writ.

A party ought not to lie by, and impose upon the town the expense of appraising, assessing and collecting damages, and then attempt by certiorari, to annul the proceedings in laying out the road. He should have applied for the writ promptly, or, what was the most appropriate remedy, he should have appealed from the order laying out the road. For these reasons, the writ should be quashed, so far as relates to laying out the road.

As to the assessment of damages, laches are not imputable to the relator, but his objections to them are so technical, as to be almost frivolous. The only one worthy of consideration, is, that one of the commissioners of highways, who applied for the assessment of damages, was himself one of those, whose lands had been taken for the road. My recollection is, that this General Term has ruled that a commissioner of highways is not disqualified, because he owns lands, over which he unites with other commissioners in laying out a highway. Commissioners of highways, like assessors, must act in matters in which they have a pecuniary interest. Roads must be laid out, and taxes must be assessed; and the injustice that may be done, must be borne, or roads cease to be laid out and taxes assessed. The law permits towns to elect one highway commissioner. If the public interest demands a highway laid out over his land, how is it to be done, if he cannot act? The statute makes no provision for substituting any other officer or person in his place. If, how-

ever, we are wrong in this, still, it is in our discretion, whether we will grant the relief sought by this writ; and we think mischief, instead of good, would result from setting aside the proceeding of either set of commissioners.

The writ of certiorari is quashed, with costs to be paid by the relator.

Writ quashed, with costs to be paid by the relator.

WILLIAM CANDEE, RESPONDENT, v. S. ANGELINE BURKE
AND OTHERS, APPELLANTS.

Foreclosure by advertisement — Notice of sale — Surplus money — Effect of receipt of, by mortgagor — Foreclosure sale — purchaser at, necessary party to an action to have it declared void.

In foreclosure by advertisement, if the notice of sale gives to the public the means of ascertaining the facts, required to be stated in the notice of sale, by accurate reference to the record of the mortgage in the clerk's office, it is enough; and a strict conformity to the provisions of the statute, is not essential to the validity of the foreclosure.

The receipt of surplus money on a foreclosure sale by the mortgagor or his representatives, does not estop the party from questioning the validity of the sale, though it is evidence to be considered in passing on the question of the regularity of the proceedings.

The purchaser at a foreclosure sale is a necessary party to any action to have the sale declared void.

APPEAL from a judgment entered on the verdict of a jury at the Onondaga circuit. The action was in ejectment to recover possession of four parcels of land situated in Onondaga county. The defense interposed is set forth in the opinion.

J. C. Hunt, for the appellants.

William C. Ruger, for the respondent.

MULLIN, P. J.:

This appeal is in the same action in which the judgment on the demurrer has just been affirmed; this being an appeal from the judgment, on the merits.

It becomes necessary to state more fully the defenses set up by the defendant in his answer, than was done in deciding the appeal from the judgment on the demurrer.

The first defense denies the complaint, except two or three allegations.

The second, third and fourth defenses set up an adverse possession of the one hundred acres, secondly described in the complaint, by Enos Burke, the husband, S. Angeline Burke, and the father of the other defendants, and, since his death, for more than twenty years prior to bringing the action.

In the fifth defense, it is alleged that S. Angeline was married to Enos Burke, in 1839, and that, during the time they lived together as husband and wife, he became seized in fee of said one hundred acres, secondly described in the complaint. That Burke died in 1862, leaving said Angeline, him surviving; that she had not joined him in any conveyance of said land, and that she is entitled to possession, etc., of one-third part of said land, as for her dower therein.

In the sixth defense, it is alleged that, in August, 1842, Burke and said S. Angeline mortgaged said one hundred acres, secondly described in the complaint, to one Remington, for \$1,800; that in 1844, said premises were sold on foreclosure of said mortgage, and bid in by one Worden. That S. Angeline was not a party to said foreclosure. That Burke remained in possession, claiming title, and the defendants have been in possession since his death, claiming title under Enos; and that her right of dower has not been barred, and she is now entitled to dower therein, and to redeem the same.

The seventh and eighth defenses set up adverse possession to the one hundred acres, just described in said complaint.

In the ninth defense, Mary Burke alleges title to one-third of one-seventh of the parcel, thirdly described in said complaint.

In the tenth defense, the defendants allege that, in August, 1844, an arrangement was made between Enos Burke and the plaintiff, and Daniel Candee, by which, Burke was to convey to them the one hundred acres firstly described in the complaint, and caused the other one hundred acres to be conveyed to them by Hicks Worden, in order to defraud said Burke's creditors; and that the conveyance was made accordingly.

The eleventh defense is a like defense of fraud, as to the other parcels of land described in the complaint.

Defendants put in an amended answer in addition to the former answer, in which they alleged the said several parcels of land were conveyed to the plaintiff as security, and subject to their right to redeem, and alleging that the whole amount advanced by the defendant had been paid, and praying an accounting and conveyance.

The defense set up in this answer, and such of the defenses in the former answer as set up a counter-claim, were replied to, setting up a former suit for the same cause of action, in bar, in which the judgment was for the defendant.

After the entering of judgment on the demurrer, the parties went down to trial on the issues of fact. The plaintiff gave in evidence, deeds to himself and Daniel Candee, of the two hundred acres described in the complaint, and a deed from Ruth Graham and others, to plaintiff, of the remaining parcels. He also put in evidence the mortgage from Burke and wife to Remington, above mentioned, and offered the proceedings to foreclose said mortgage by advertisement, which evidence was objected to by defendant's counsel, on the ground that the mortgage had not been legally foreclosed.

The objections to the proceedings were,

First: That S. Angeline Burke was not served with notice of the sale, and her right of redemption remained, and that, as to her interest, there could be no recovery.

Second: That the same right of redemption extends to the heirs of Burke who are in possession with her.

Third: The foreclosure was absolutely void, because the notice of sale did not contain the name of the mortgagee.

In order to meet and remove the objection to the foreclosure, the plaintiff put in evidence a receipt from Burke for the surplus moneys arising from said sale; also the evidence of one Edwards, taken on a former trial, that "the surplus money was received by Burke and Worden." It would seem to have been the opinion of the plaintiff's counsel, as well as of the court, that the receipt of the surplus moneys estopped Burke, and those claiming under him, from questioning the regularity of the foreclosure. It was

said by the chancellor, in *Wood v. Jackson*,* that the receipt of the surplus moneys, arising from a sale of land on execution, did not preclude the owners from questioning the validity of the sale, as they had done nothing to encourage the purchasers to bid. I am unable to perceive any reason why the same principle should not be applied to the receipt by the mortgagor or his representatives, of surplus money arising on the sale of the mortgaged premises. Although the receipt of the surplus may not estop the party, it would seem to be evidence to be considered in passing on the question of the regularity of the proceedings. If the owner retain the surplus money, no court would set aside the foreclosure, without requiring him to refund what he had received.

The question recurs, was the foreclosure void, because Mrs. Burke was not made a party, or because the mortgagee's name was not inserted in the notice? The only effect of omitting to serve on Mrs. B., was to leave her right of redemption unforeclosed, which she may assert at any time; it does not render invalid the foreclosure as to the other parties properly served. Had the name of the mortgagee been altogether omitted from the notice, there would perhaps be some ground for holding the foreclosure irregular, as not complying with the requirements of the statute. But his name is signed to the notice of sale, and the mortgage is in all other respects correctly described.

If the legislature, in prescribing the contents of the notice, intended to secure to the public, accurate information as to the mortgage, and description of the premises, and not strict compliance with its provisions, the notice in question gives effect to the intention. If any person desired to know who the mortgagee was, who was not fully satisfied that the person signing the notice was such, could readily inform himself, by reference to the book in the clerk's office, mentioned in the notice.

The case of *Judd v. O'Brien*† is authority for holding, that, if the notice of sale gives to the public the means of ascertaining the facts, required to be stated in the notice of sale, by accurate reference to the record of the mortgage in the clerk's office, it is enough; and a strict conformity to the provisions of the statute, is not essential to the validity of the foreclosure. There is, however

* 8 Wend., 9, 31.

† 21 N. Y., 186.

another and more conclusive answer to the objection of defendants' counsel, and that is, that the sale cannot be declared void, except in a proceeding, to which the purchaser Hicks Worden is a party. He is not a party to this suit. Worden may have conveyed with covenants; to declare the sale void, is to divest him and his grantor of the title, and to subject him to liability on his covenants. This, surely, should not be done, without affording him an opportunity to be heard.

The defendants' counsel objected, on various grounds, to the admission in evidence of the judgment record in the former suit, and which was set up in plaintiff's reply, as a bar to the relief demanded in such former suit.

It is unnecessary to consider these objections, as the judgment on the demurrer, that defendants' counsel permitted to be entered against his client, instead of asking him to withdraw his demurrer, which, if done, would have left the reply denied, rendered unnecessary any proof of the former action, as they were admitted, for all purposes of the action, by the demurrer.*

The will of Daniel Candee was properly received in evidence. The plaintiff took under a conditional estate in fee, and, until a breach of the condition, he could maintain an action of ejectment.†

The defendants' counsel claimed the right to give evidence in support of his defenses, setting up adverse possession by the defendants and their ancestors, for more than twenty years before suit was brought. The court refused to permit such evidence to be given, holding that the judgment in the former action, was a bar to the defense of adverse possession. To which ruling, the defendants' counsel excepted. The only subject for inquiry, is, whether the question of adverse possession was involved or decided in the former action; if it was, the judgment in that case, forbids an investigation of that subject in this action. No such allegation is made in the complaints in the former action, nor is there any adjudication on that question. Indeed, a claim of adverse possession in that action, would have been inconsistent with the claim for redemption, resulting from the relation of mortgagor to mortgagee. I entertain no doubt but that the defendant was entitled

* *Cutler v. Wright*, 22 N. Y., 472.

† 4 Kent's Com., 123, 540; *Olmsted v. Harvey*, 1 Barb., S. C., 103.

to give evidence on the trial, under his defense of adverse possession.

The defendants cannot be permitted to set up the alleged combination between Enos Burke and Daniel Candee, and the defendants, to defraud the creditors of said Burke; with that question they have nothing whatever to do. Burke could not set up any such defense, and his heirs are estopped, as well as himself.

If the defendant Mary Burke is entitled to any share of said lands, the share can be ascertained on the next trial.

The judgment must be reversed, costs to abide event.

Judgment reversed, costs to abide event.

WILLIAM N. BURT, RESPONDENT, v. URIAH SAXTON,
IMPLEADED WITH OTHERS, APPELLANTS.

Sealed instrument — time of payment of, may be extended by parol.

The defendant was desirous of purchasing premises, upon which the plaintiff held a mortgage. Being unable to make the payments at the times specified in said mortgage, he called upon the plaintiff, who agreed, by parol, that if the defendant would purchase the premises, pay \$200 the ensuing spring, and interest on all sums remaining unpaid annually thereafter, and would make certain improvements on them, he would extend the time of payment of the mortgage for twenty years. The defendant purchased the premises, assuming, by his deed, the payment of the mortgage, paid the \$200, and made the specified improvements, but failed for two years to pay the interest.

In an action brought to foreclose the mortgage, *held*, that the time of payment was extended by the verbal contract, and that there was no default in the payment of the principal; that the payment of the interest was a condition which the defendant must perform, but that its non-payment was not such a breach of the condition as made the whole principal due.

APPEAL from a judgment of foreclosure and sale, in favor of the plaintiff, entered upon the report of a referee.

In May, 1867, one Seth H. Bills executed and delivered to the plaintiff, his bond, in the penal sum of \$4,000, conditioned to pay \$2,000, as follows, viz.: \$500 on the 1st September, 1867, and the remainder in three equal annual payments from said last-mentioned day, with annual interest. To secure the payment of this bond,

Bills and wife executed and delivered to plaintiff, a mortgage on certain real estate in the town of Castile, county of Wyoming. This action was brought to foreclose this mortgage.

The defendant, Saxton, before the action was commenced, and in February, 1868, purchased the premises covered by the mortgage of Bills, and assumed the payment of the same as part of the price.

Saxton, only, appeared and answered. He set up, by way of defense, that, being desirous to purchase said premises, he applied to Bills, and he consented to sell; but as he (S.) could not make the payments at the times specified in the bond, he called on the plaintiff and informed him of his wish to purchase. Plaintiff told him he wished he would purchase; that, otherwise, he might be compelled to take back the property, which he did not wish to do; and, upon being told that he (S.) could not pay according to the conditions of Bills' bond, the plaintiff told him if he would pay the then ensuing spring, \$200 on the mortgage, and interest, annually, on the whole sum unpaid, and, upon the condition that he (S.) would perform said agreement, and would make such improvements on the premises as would make the mortgage a first-class security, he would extend the time as long as he (S.) desired, not exceeding twenty years; and S. might, at his option, pay any part of the principal at any time within twenty years. At the time of this verbal agreement, there were due on the mortgage, \$500 of principal, and about fifty dollars of interest. In pursuance of this agreement, S. purchased said premises of Bills, and, by a covenant inserted in the deed thereof from Bills to him, he assumed to pay said bond to the plaintiff; went into possession; paid \$200 on the principal; and, during the two years then next ensuing, he made improvements on the premises, to the amount of about \$2,000.

The issues were referred for trial, and the referee found the facts aforesaid, and that defendant had not paid any interest on said bond and mortgage, save the payment of \$200, but did pay \$400 of principal; and that the premises had been increased in value by the defendants from \$2,100, when he bought them, to \$6,000, their value at the time of the trial.

This action was commenced in 1870, and after the whole mortgage debt had become due, according to the condition of Bills' bond.

The referee held, as a conclusion of law, that the verbal agreement above mentioned, including the acts of the parties under it, did not operate to extend the time of payment, as originally stipulated in the mortgage, and he ordered judgment of foreclosure and sale, with costs.

E. E. Farman, for the appellant. The parol agreement operated to extend the time of payment of the mortgage. (*Dodge v. Crandall*, 30 N. Y., 294; *Townsend v. Empire Stone Dressing Co.*, 6 Duer, 208; *Lattimore v. Harsen*, 14 John., 330; *Delacroix v. Bulkley*, 13 Wend., 71.)

Thomas Corlett, for the respondent. A specialty, before breach, cannot be changed by parol. (*Mitchell v. Hawley*, 4 Denio, 414; *Kuhn v. Stevens*, 36 How., 275; *Clough v. Murray*, 3 Robt., 7.) The agreement was void by the statute of frauds. (*Wilson v. Lester*, 64 Barb., 431; *Smith v. Devlin*, 23 N. Y., 367.)

MULLIN, P. J.:

It is well settled in this State, whatever the rule may be elsewhere, that the time of performance of a contract under seal, may be extended by parol.*

The court, in *Clark v. Dales*,† adopted the ruling of the Supreme Court of Pennsylvania, ‡ that a new consideration is not necessary to give validity to an agreement to extend the time of performance; the waiver is enough for this purpose. It is said by the learned judge, in his opinion in the case cited, that the effect of an agreement to enlarge the time, is to substitute or adopt the extended time, for the time specified in the original contract. It then stands as a new agreement, whenever the mutual promises furnish a good consideration. If a consideration was essential to the agreement to extend the time of payment, the assumption of the mortgage debt by the defendant, Saxton, is sufficient to bind the plain-

* *Fleming v. Gilbert*, 8 J. R., 528; *Keating v. Price*, 1 J.'s Cases, 22; *Esmond v. Vanbenschoten*, 12 Barb., 369; *Clark v. Dales*, 20 id., 42; *Stone v. Sprague*, id., 509; *Flynn v. McKeon*, 6 Duer, 208; *Meehan v. Williams*, 2 Daley, 367; *Newton v. Wales*, 8 Robt., 453.

† *Supra*.

‡ 14 Serg. & Rawle, 241.

tiff, and the extension is ample to bind the defendants. It is not intimated in any of the cases that hold that time of performance of a sealed or written contract may be extended by parol, is in conflict with the general rule that a written contract cannot be varied or modified by parol. We must hold, then, that the time of payment was extended by the verbal contract, and that there was no default in the payment of the principal of the indebtedness. Interest was unpaid at the commencement of the action, for which there might have been a foreclosure, but not for the whole debt. The payment of interest is a condition which the debtor must perform, but its non-payment is not such a breach of the condition as makes the whole principal due. But if the whole principal became due upon default to pay the interest, this case was not tried nor decided upon that theory. The defendant was precluded from having his defense considered by the referee, and a new trial becomes indispensable.

The judgment must be reversed and a new trial granted; costs to abide event.

Judgment reversed and new trial granted, costs to abide event.

ORRIS MARSH, RESPONDENT, v. THE TOWN OF LITTLE VALLEY, APPELLANT.

Towns — when action will lie against — Bonds of — rights of bona fide purchaser of — Effect of repeal of act authorising the issue of town bonds.

Town bonds, payable to bearer, and which appear on their face to be issued in pursuance of the express authority of the legislature, are not, when in the hands of a bona fide purchaser for value, open to any defense in respect to their validity.

St. Joseph Township v. Rogers (16 Wall., 644) followed.

The holder of such bonds may maintain an action at law against the town, and is not compelled to resort to mandamus.

No action at law will lie against a town in respect to all that class of claims, accounts or demands, which come within the scope of the powers and duties, conferred upon the board of town auditors, to examine, settle, adjust and allow; certainly not until they become fixed, recognized and admitted debts. But this rule does not apply to settled and admitted debts, resting on bond, or upon other adjusted admission or obligation, binding on the town.

The doctrine laid down in *Bell v. The Town of Ecopus* (49 Barb., 506) limited.

The rights of a *bona fide* purchaser of such bonds, cannot be taken away or affected by the subsequent repeal of the act under which they were issued.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this case before the court, without a jury.

This action is upon three town bonds, given by the defendant for bounties to soldiers, mustered into the service of the United States, upon the call of the President, in 1864, and issued under chapter 590, of the Laws of 1869, legalizing the acts of the town meetings of said town, in August, 1864, under which, said bounties were authorized.

The cause was tried by a judge at the circuit, without a jury, who rendered judgment for the plaintiff, for \$1,073.31, the amount of said bonds, holding them to be legal and valid bonds, and enforceable by action against the town.

Henderson & Wentworth, for the appellant.

Cary & Jewell, for the respondent.

E. DARWIN SMITH, J.:

The circuit judge, we think, correctly held that the bonds in suit were valid obligations against the defendants. These bonds were payable to bearer and are valid commercial instruments, and, it appearing that the plaintiff was a *bona fide* holder of them, for value, and, as they appeared on their face to be issued in pursuance of the express authority of the legislature, they were not open to any defense in respect to their validity, within the case of *St. Joseph Township v. Rogers*.*

As it is stated in the points of the appellant's counsel, that neither the town, nor officers, nor the board of supervisors, controverted or disputed this claim, nothing is really presented for our consideration, but the single question whether the remedy of the plaintiff for the recovery of said bonds, was by action or mandamus. The judge at Special Term, held that the plaintiff could maintain this action, and gave judgment therein, accordingly.

The towns of this State are invested, to a certain extent, with the rights and duties of a corporation, and may sue and be sued in the manner prescribed by law.†

* 16 Wallace, 644.

† 1 Rev. Stat., 337, sec. 1.

They may sue to enforce corporate rights, and be sued for the enforcement of their corporate liabilities, when the assertion of such rights, or the enforcement of such duties, shall require such a proceeding.* It is undoubtedly true, that, in respect to all that class of claims, accounts or demands against a town, which come within the scope of the powers and duties conferred upon the board of town auditors, to examine, settle, adjust and allow, no action at law will lie against the town; certainly not until they become fixed, recognized and admitted debts. The case of *Bell v. The Town of Esopus*† asserts this doctrine, and I think the court in that case did not intend to assert any other. That case should be limited to the large class of unliquidated charges against towns, which rest in claim and demand, until passed upon, audited and adjusted by some lawful authority. All such claims may be properly termed claims arising upon contract, and for which an action will not lie, within the intent and meaning of that case. But, clearly, the rule of that case does not apply to settled and admitted debts, resting on bond or upon other adjusted, liquidated admission or obligation binding on the towns. In such cases, the preliminary stages, as in this, of dispute, contestation and settlement and adjustment, have all been duly passed.

The bonds in this action are the clear, undisputed, liquidated debts of the town, and we have no doubt that the action was properly brought thereupon, as held by the judge at the circuit, and was rightfully sustained, within the cases of *Brown v. The Town of Canton*,‡ *Hathaway v. The Town of Homer*,§ *St. Joseph Township v. Rogers*|| and *Northrup v. Town of Pittsfield*.¶

The repeal of the act of 1869, by chapter 21 of the Laws of 1873, could not take away or affect the plaintiff's vested rights, as a *bona fide* purchaser of these bonds.

The judgment should be affirmed.

Present—MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment affirmed.

* *Lorillard v. Town of Monroe*, 11 N. Y., 394.

† 49 Barb., 508.

‡ 4 Lansing, 418.

§ 1 Lansing, 272.

|| 16 Wallace, 645.

¶ 2 N. Y. Sup. Ct., 108.

HOSEA CRANDALL, APPELLANT, v. ALBERT W. SCHROEPPPEL, RESPONDENT.

Promissory note — real party in interest — right of party paying, to have note surrendered or canceled.

THIS action was brought on a promissory note, made by the defendant, payable to the plaintiff or bearer. At the trial, the note was produced by a witness, who claimed to own it as administrator of an estate, while the plaintiff testified that he owned the note, and that it had never been transferred or paid. *Held*, that the plaintiff was not entitled to recover, as he had not possession of the note, and it was not lost.

A party paying a promissory note, or negotiable bill, is entitled to the delivery of such note or bill, on payment, or its production, that it may be discharged or destroyed in his presence.

Van Alstyne v. The National Commercial Bank of Albany (7 Transcript Appeals, 241) followed.

APPEAL from a judgment of the County Court of Onondaga county, reversing a judgment of a justice of the peace, in favor of the plaintiff.

The action was upon a promissory note, made by defendant to plaintiff as payee or bearer. At the trial, the note was produced by a witness, who claimed to own it as administrator of an estate, and plaintiff then testified that he owned the note, had never transferred it, and that it had not been paid. The justice gave judgment for the plaintiff, for the amount remaining unpaid on the note, and the defendant appealed to the County Court, where the judgment was reversed.

I. D. Garfield, for the appellant.

William C. Ruger, for the respondent.

E. DARWIN SMITH, J. :

None of the grounds of error, stated in the notice of appeal served upon the justice, are sufficient to raise any question for review, according to the cases of *Delong v. Brainard** and

* 1 N. Y. Supreme Court, 1.

Nolan v. Page,* except the ground that the justice erred in denying the motion for a nonsuit, made by the defendant at the trial.

This specification was, I think, sufficient to raise the question presented on the motion for a nonsuit before the justice. The ground of error, thus stated, must be deemed to refer to the grounds stated and urged on the motion for the nonsuit. One ground stated for such motion, was, that the note, upon which the action was brought, is now held by the administrators of Charles Crandall, deceased, and they claimed to own the same, and, from the facts proved, they are the owners.

The County Court doubtless reversed the judgment of the justice on this ground, it appearing that the note was negotiable, being payable to the plaintiff or bearer, and was in the hands of the administrators named, who claimed title to it, and produced it at the trial under protest, claiming to own it. Upon these facts appearing, I think the plaintiff should have been nonsuited. He had not possession of the note, and it was not lost. A party paying a promissory note, or negotiable bill, is entitled to the delivery of such note or bill, or payment, or its production, that it may be discharged or destroyed in his presence.†

It was held in *Freeman v. Boynton*‡ that a demand of payment of a promissory note of the maker, with the view to charge the indorser, was not good, because the person making the demand, had not the note with him to deliver it up on receiving payment. Judge PARKER, in the opinion, said: "The debtor may well refuse to pay, on the ground that he has a right to have his obligation or contract, or to see it canceled, when he is called upon to discharge it; and this rule should especially apply to negotiable securities."

The judgment rendered by the justice, did not necessarily extinguish this note, for the plaintiff could not produce it to the justice for cancellation, or give a valid discharge of it, which would have protected the defendant from another suit, and judgment upon it, by the holder; nor would the payment of the judgment, rendered by the justice, have that effect. The title to the note could not be judicially settled in this suit, because the admin-

* Addenda in N. Y. Sup. Ct. R., p. 2.

‡ 7 Mass., 496.

† Bank of Utica v. Smith, 18 Johns., 240.

istrators of Charles Crandall are not parties to the action, and could not be bound by any decision of the justice on that point; nor could the plaintiff by his own testimony establish his title to the note, as against such administrators.

The case of *Van Alstyne v. The National Commercial Bank of Albany*,* in principle, I think, settles this question.

That was an action upon a draft, against the drawers, held adversely, as with the note in this case. The Court of Appeals held that the plaintiff could not recover without the production of the draft at the trial, and could not throw upon the bank the burden of litigation between the conflicting parties claiming such draft, and could not recover upon it as a lost draft.

The judgment of the County Court, reversing that of the justice, should be affirmed.

Present—MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment affirmed.

ENOS T. SIMPSON AND ANOTHER, EXECUTORS, ETC., RESPONDENTS, v. ESTHER ENGLISH AND OTHERS, APPELLANTS.

Will—construction of—Accumulation—directions for—when void.

The ninth clause of the will of the plaintiff's testator, was as follows: "I further bequeath to my children, after paying all the above legacies and my just debts, all interest that may accrue on the balance of my estate, to be divided between them at the age of forty years, to hold for their natural lives and then to be divided between their heirs." *Held*, that the provision for the accumulation of the income of the estate was void, as it extended beyond the minority of the children; and *held further*, that the provision could not be held void in so far as it required the accumulation to extend beyond the minorities of the respective children, and effect be given to the residue, for the reason that it provided for a suspension of the power of alienation for more than two lives in being at the time of the creation of the estate.

APPEAL from a judgment, entered upon the trial of this action at Special Term.

*7 Transcript Reports of the Court of Appeals, p. 241.

The action was brought by the executors of Myron J. English, deceased, to obtain a judicial construction of his will. The only question before the court, was as to the validity of the ninth item of the will, which is given in full in the opinion of the court.

H. R. Selden, for the appellants.

Holmes, Thompson & Spencer, for the respondents.

E. DARWIN SMITH, J.:

The cardinal rule in the construction of wills, is to seek the intention of the testator, and give effect to such intention, if not inconsistent with the rules of law.*

The difficulty and doubt in respect to the will of the testator in this case, relates to the section or provision of said will, numbered therein as ninthly, which is as follows: "I further bequeath to my children, after paying all the above legacies and my just debts, all interest that may accrue on the balance of my estate, to be divided between them at the age of forty years, to hold for their natural lives and then to be divided between their heirs." The testator left three children, which, at his decease, were under age, all of whom appear and answer in this action, by guardian *ad litem*, by answer dated May 3d, 1873. The learned judge who tried this cause at Special Term, held, that all the residuary estate and interest, remaining after paying debts, annuities, legacies and bequests, referred to in said ninth clause of the will, vested in the said testator's said three children, upon his death, as tenants in common, each having an undivided third part thereof, for his or her natural life, and no more, with remainders over to the heirs-at-law of such children, respectively. If this be so, and these children took any present estate under said will, it was subject to a power in trust in the executors, to control the property and receive the rents and profits thereof, and to accumulate the same till the said children should arrive at the age of forty years, when the amount or balance of such increased accumulation, was to be divided between them, and they were thereafter to receive such increase during their natural lives, and, upon their decease, the remainder was to

* *Parks v. Parks*, 9 Paige, 117.

go to their heirs, and was to be divided between them. This was the clear intent of this provision of the will. This provision for the accumulation of the income of such estate, was clearly void beyond the majority of said children, respectively, under the provisions of sections 37 and 38, of article 1st, chapter 1, part 2, of the Revised Statutes, page 726. This provision for the accumulation of the income of the estate, might be held void after the said children respectively arrived at their majority, and effect given to the residue of the will, except that the suspension of the power of alienation of said estate, would then be for more than two lives in being at the time of the creation of such estate, which would make this clause of the will void, within the provisions of sections 13, 14 and 15, of said title and chapter of said statute, and the absolute ownership of such estate, if personal, within section 1, title 4 of said statute, page 773. This provision of the will was therefore clearly void, and must be so declared, and the judgment at Special Term, so far as it holds otherwise, should be reversed.* Regarding this residuary clause of the will as void, there is nothing in the will to charge upon the real estate, embraced in such residuary clause, the payment of the legacies contained therein. The personal estate is the proper fund for the payment of debts and legacies,† and no power can be implied in the executors to sell the real estate.‡

The judgment of the Special Term should therefore be modified in conformity with these views.

Present—MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment modified accordingly.

* *Knox v. Jones*, 47 N. Y., 390.

† *Myers v. Eddy*, 47 Barb., 263; *Lupton v. Lupton*, 2 John. Ch., 614.

‡ *Vide Matter of the Will of Fox*, 52 N. Y., 530.

JAMES BELLINGER AND MARCUS BELLINGER, PLAINTIFFS, v. EDWARD BENTLEY AND NELSON C. DUNHAM, DEFENDANTS.

Officers of corporation — when personally bound by contract entered into in its behalf.

The defendants, who were trustees of the Little Utica Cheese Manufacturing Company, and authorized to transact business in its behalf, entered into an agreement with the plaintiffs, whereby the latter agreed to manufacture cheese at the factory of the company, at a specified price, upon certain terms and conditions, in said agreement contained. The defendants were described in the body of the agreement as the trustees of the company, but it was signed by them individually. This action was brought by the plaintiffs to recover for a breach of the contract. *Held*, that they were not entitled to recover; that the contract was, in fact and in legal effect, the contract of the company, and that the defendants were not personally liable thereon.

The cases of *Bush v. Cole* (28 N. Y., 269) and *Pumpelly v. Phelps* (40 id., 67) distinguished.

MOTION for a new trial, on exceptions ordered to be heard in the first instance at the General Term.

This action was brought to recover a balance, alleged to be due from defendants, for cheese manufactured and accepted by them, under an agreement, of which the following is a copy:

"An article of agreement made and entered into this 20th of April, 1870, between Edward Bentley, Horace Butler and N. C. Dunham, trustees of the Little Utica Cheese Manufacturing Company, the parties of the first part, and James Bellinger and Marcus Bellinger, of Lysander, Onondaga county, N. Y., the parties of the second part, witnesseth: The parties of the first part agree with the parties of the second part to manufacture and make cheese at the aforesaid factory during the season of making cheese in 1870, and the parties of the second part agree to do all the work and furnish all the material for making cheese and boxes for \$1.50 per hundred for the make in said factory, and to make good number one merchantable cheese; the parties of the first part agree that the patrons of said factory shall furnish the milk two or one time per day in good order, except those that wish to keep their milk home on Sunday. The parties of the first part agree to put

said factory in good running order, and furnish sufficient amount of water and sufficient amount of ice in the ice-house for the season that is required for the season of running factory. The parties of the second part is to have the privilege of sending all milk that does not come to said factory in good order for making cheese home. The parties of the first part are to pay the parties of the second part, after each sale of said cheese, and get the returns; and the parties of the second part are to take care of said cheese until it is thirty days old, and take care of said cheese twenty days after said factory closes. Said factory to commence on the second day of May, and run the six months, or longer, if the parties of the first part wish to have it run. The parties of the second part are to feed the hogs and help box the cheese in the agreement. Cheese to be made on an average of nine inches high. In witness whereof the parties have hereunto set their hands the day and year first above writton.

EDWARD BENTLEY.

N. C. DUNHAM.

JAMES BELLINGER.

M. R. BELLINGER."

[Revenue stamp,
5 cts., canceled.]

The defendants and one Horace Butler, were, during the year 1870, trustees of the Little Utica Cheese Manufacturing Company, an association, formed under the general laws of this State for the purpose of manufacturing cheese; and they had, as such trustees, authority to manage all the business pertaining to the company.

It appeared upon the trial, that the plaintiff, James Bellinger, was a stockholder in the company in 1870, and that the premises upon which the factory of the company was situated, were leased to it by him.

At the conclusion of the plaintiff's evidence, the defendants moved for a nonsuit, on the ground that they had made the said agreement as trustees or agents of the company, having full authority to make the same, and that they were not personally liable thereon; and, on the same ground, at the close of the evidence, they requested the court to instruct the jury to find a verdict for them. The court denied the motion and refused to charge as requested, and the defendants duly excepted. The jury found a

verdict for the plaintiffs, for the amount claimed. The exceptions were ordered to be heard in the first instance at the General Term.

D. Pratt, for the plaintiffs.

Sedgwick, Kennedy & Tracy, for the defendants.

E. DARWIN SMITH, J.:

The motion made at the Circuit for a nonsuit, should, I think, have prevailed.

The contract upon which the action was brought, was, in fact and in legal effect, the contract of the Little Utica Cheese Manufacturing Company. It purports to be made by the trustees of such corporation, who, the proofs show, were clearly fully authorized to make it in behalf of the corporation. The defendants describe themselves as such trustees. The contract is for the benefit of the corporation upon its face. It stipulates for the use of the corporate property, the cheese factory, by the plaintiffs, in the manufacture of cheese—the particular business of said corporation—in the factory of said company. The plaintiff agreed to manufacture and make cheese at the said factory, during the season of making cheese in 1870. The proofs show that the affairs of said corporation were to be managed by three trustees, and that the trustees, named in the said agreement, were such trustees for the year 1870, and two of them were authorized by the by-laws to constitute a quorum for the transaction of business, and two of them, in fact, signed the agreement. This made it a valid contract of the corporation. The plaintiffs knew that the defendants were contracting for the corporation; one of them was a stockholder and the other his son. The factory was on the land of the elder Bellinger, one of the plaintiffs, and was leased to the corporation by him for the use of such factory, and he was a stockholder in said company. There is nothing in the contract or circumstances, indicating that the defendants had any private interest in said factory, or in the business of making cheese therein, or in said contract, any more than the other stockholders of said company, or that they intended to bind themselves individually. They made a clear, plain, palpable contract in behalf

of said company, and for its sole benefit, and they had full authority to make such contract; and the said corporation could clearly have been sued on such contract, as binding upon it. If the defendants had made and signed this contract without authority to do so, they would doubtless have been personally liable on the contract, within the cases of *Bush v. Cole*,* *Pumpelly v. Phelps*,† and numerous other cases. But, when officers or other agents contract for a corporation, and have full authority to do so, and the work to be done, or the property purchased, is for the exclusive benefit of the corporation, and that is known at the time of the making of the contract, the agent is not bound personally, unless he binds himself by some particular, personal contract, or fails to make a contract binding upon his principal.

In *Randall v. Van Vechten*,‡ the principal was held liable in assumpsit, on the contract, made by persons acting as a committee of the city, who signed it with their private seals, as was the case in *Haight v. Sohlar*, where the persons, making the contract, signed it with their seals, as a building committee. The same principle is asserted in *Worrall v. Munn*,§ and numerous cases there cited, in asserting the same rule, and the case of *Randall v. Van Vechten* approved, as it is, also, in *Dubois v. Delaware Company*.¶

In this case, it appears that the corporation ratified their contract, and made payments to the plaintiff under it, to the amount of \$1,071.80, leaving due the plaintiff, a balance of only \$250, for the cheese manufactured by them at such factory during the season.

In *Bush v. Cole*, and *Pumpelly v. Phelps*,¶ the principal was unknown to the parties contracted with. In *Bush v. Cole*, the opinion stated that the defendants signed the contract as the agents of an undisclosed principal, and, as they did so without authority, were personally liable as the contracting parties. In *Pumpelly v. Phelps*, the contract was signed by the defendant, simply as trustee, and the case states that there was nothing in the contract, to intimate, of whom he was trustee. But in this case, on the contrary, the defendants describe themselves as trustees, etc., in the

* 28 N. Y., 209.

† 40 Id., 67.

‡ 19 Johnson, 60.

§ 1 Selden, 241.

¶ 4 Wend., 288.

¶ *Supra*.

body of the contract, and state expressly the name of the corporation of which they are trustees, and for which they are acting.

I think the defendants fully showed at the Circuit, that the contract they made, was binding on such corporation, and that they had full authority to make it, and that it was a valid contract of such corporation, and that they were therefore not individually liable thereon.

The verdict should, therefore, be set aside, and a new trial granted, with costs to abide the event.

Present—MULLIN, P. J., SMITH and GILBERT, JJ.

MULLIN, J., not voting.

So ordered.

SEWARD F. GOULD, RESPONDENT, v. JOHN R. MARSH,
APPELLANT.

Chattel mortgage—right of assignee of—promissory note secured by—rights of holder of.

A *bona fide* purchaser, before maturity, of a promissory note, secured by a chattel mortgage, takes the mortgage as he takes the note, free from any equities which existed in favor of third parties while it was held by the mortgagee.

Carpenter v. Longan (16 Wall., 271) followed.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

On the 20th day of May, 1870, James Morton, then being the owner of the property described in the complaint, consisting of the printing-presses, etc., of the Avon Journal printing-office, sold and delivered the same to Jane Cotter, in consideration of \$3,000, on which purchase she paid, on or about that day, \$500, and for a further payment she gave to Morton her note of \$500, dated that day, indorsed by James R. Cotter, her son and agent, payable sixty days after date. Morton indorsed the note and attempted to get it discounted, but failed to do so. James R. Cotter, claiming to be the agent and attorney, in fact, of his mother, on the 25th of May, 1870, procured the indorsement of John R. Marsh, the

defendant, upon said note, and, to secure him for the liability thus assumed, he executed, as agent for his mother, a chattel mortgage upon said property. This mortgage was delivered by the defendant to Morton, with a request to file it in the town clerk's office, which he agreed to do. Morton did not file it, but retained it in his possession until about September 10, 1870, when Marsh, learning it was not filed, procured it of Morton and had it filed in the proper town clerk's office.

On the 10th of June, 1870, Mrs. Cotter gave to Morton three promissory notes for the aggregate sum of \$2,000, the residue of the purchase-price of said property, payable, respectively, January 20, 1871, July 20, 1871, and June 20, 1872, and a chattel mortgage on the same property to secure their payment, which was filed on the next day in the town clerk's office. A few days after the execution of these notes and the mortgage, the first of the notes was presented to the plaintiff, a banker at Avon, for discount, by Morton, who informed him it was secured by a mortgage which was a first lien upon the property. After examining the records, the plaintiff discounted the note.

On the 25th of October, 1870, Morton assigned the other two notes and the mortgages to one R. P. Flower, who subsequently assigned them to the plaintiff. The note indorsed by the defendant went to judgment, and nothing was ever paid upon it.

On the 17th of February, 1871, plaintiff took possession of the property, by virtue of the mortgage to Morton, and advertised it for sale. The sale was postponed to the fourth of March, when it took place, and the property was bid off by the plaintiff.

The defendant advertised the property under his mortgage, and sold it on the first of March, purchasing the property himself.

Subsequent to the sale by the plaintiff, and his purchase of the property, he demanded it of the defendant, who refused to deliver it, and this action was brought to recover its possession, and it was delivered to him by the sheriff.

E. A. Nash, for the appellant. The lien of the plaintiff's mortgage was subsequent to that of the defendant. (*Van Heusen v. Radcliff*, 17 N. Y., 580; *Tiffany v. Warren*, 37 Barb., 571; *Wiles v. Clapp*, 41 Barb., 645; *Thompson v. Van Vechten*, 27 N. Y.,

570; *Woodburn v. Chamberlin*, 17 Barb., 452; *Dickerson v. Tillinghast*, 4 Paige, 220.) Plaintiff's rights were no greater than those of Morton. (*Schafer v. Reilly*, 50 N. Y., 61; *Bush v. Lathrop*, 22 id., 535; *Mason v. Lord*, 40 id., 476.)

John A. Vanderlip, for the respondent, cited *Green v. Hart* (1 John., 580); *Langdon v. Buell* (9 Wend., 80); *Jackson v. Blodgett* (5 Cow., 202); *Rose v. Baker* (13 Barb., 232); *Parmelee v. Dann* (23 id., 461); *Freeman v. Auld* (44 N. Y., 57); *Carpenter v. Longan* (16 Wall., 271).

E. DARWIN SMITH, J. :

By the express terms of the statute, the defendant's mortgage, before it was filed, was absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith.

The notice to Morton, of the defendant's mortgage, and his fraud, in keeping possession of it and not putting it upon file, according to his agreement and the trust confided to him, till after the mortgage to himself was taken and filed, preclude him from the rights of a subsequent mortgagee or purchaser in good faith.

The single question remains, whether the plaintiff, as the assignee of the second mortgage, acquired any higher rights from Morton, than he possessed by the transfer of the promissory notes, which such second mortgage was given to secure.

If the said mortgage was regarded by itself, or as a security for a bond, or any other non-negotiable chose in action, no question would remain open to discussion on this point, since the decision of *Bush v. Lathrop*,* affirmed, as it has been, in *Schafer v. Reilly*,† *Sheldon v. Edwards*‡ and *Thompson v. Van Vechten*, § and other cases.

But in the case of *Schafer v. Reilly*, *supra*, Judge ALLEN, as does Judge DENIO in *Bush v. Lathrop*, recognizes the fact, that a purchaser of a chose in action must abide by the case of the person from whom he bought. The rule admits of exceptions, "adopted from motives of public policy," as Judge ALLEN stated it,

* 22 N. Y., 535. † 50 N. Y., 61. ‡ 35 N. Y., 279. § 27 N. Y., 568.

"either to promote the negotiability of commercial instruments, or to prevent fraud."

Within this exception, I think the plaintiff is entitled to the rights of a *bona fide* purchaser, in respect to said mortgage, as the holder of the promissory note for \$666.68, dated May 10th, and due June 1st, 1871, discounted and received by him at his bank, in the ordinary course of business, in the month of June, 1870, and before the defendant's mortgage was placed on file.

The transfer of said note was, in law and equity, an assignment or transfer of the mortgage given to secure it, to the extent of the amount of said note. The notes which said mortgage was given to secure, constituted the debt, and the mortgage was the incident, and, by presumption of law, passed with the transfer of the debt.

A mortgagee is *pro tanto* a purchaser, and the assignee of a mortgage, without notice, is on the same footing with a *bona fide* mortgagee.* In such cases, the purchaser looks to, and has a right to rely upon, the record, and if that shows no lien or incumbrances prior to the mortgage, he has a right to trust to the protection of the statute.

The referee asserted these views, in accordance with the decision of the Supreme Court of the United States, in *Carpenter v. Longan*,† where the rights in respect to mortgages, given to secure negotiable instruments, are fully discussed and very carefully considered, and the doctrine asserted, that the purchaser of a negotiable security before its maturity, secured by a mortgage, takes the mortgage, as he takes the note, free from the objections to which it was liable in the hands of the mortgagees. That the note and mortgage are inseparable; the former as essential, the latter as the incident. This view, it seems to me, is eminently sound, and I think unanswerable. The referee held in accordance with this case, and his judgment should be affirmed.

Present—MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment affirmed.

* *Pierce v. Faunce*, 47 Maine, 507.

† 16 Wallace, 271.

SIDNEY A. DAY, PLAINTIFF, v. SAMUEL CROSSMAN AND
OTHERS, COMMISSIONERS OF HIGHWAYS, DEFENDANTS.

Commissioners of highways — negligence of, in repairing bridges — Onus of proving possession of funds by them.

The defendants, as commissioners of highways, had, several weeks prior to July 17, 1873, caused the plank covering to be removed from a bridge which had become unsafe, and had drawn a quantity of stone to the place, for the purpose of repairing the bridge, the openings of which they had closed. On the east side of the bridge, good approaches had been graded by the defendants, from the bed of the creek each way. On the seventeenth of July, the plaintiff, who was well acquainted with the situation of the bridge and creek, attempted, on a dark night, to cross the stream, which was very much swollen by a sudden and severe storm, and in so doing his horse was drowned. In an action brought by him to recover the value of the horse, *held*, that he was properly nonsuited; that he was guilty of negligence in attempting to cross the stream under the circumstances, and that his injury did not result from the omission of the defendant to repair the bridge, in such a sense, and with such intimacy of connection, as to render the defendants liable therefor.

At the trial, the court held that the defendants could only be liable upon proof that there were funds in their hands with which to repair the bridge, and nonsuited the plaintiff, because no such proof had been given.

Seemle. That it was too late for the defendants to raise that point; that the presumption of the possession of funds was against them, upon the ground that they had recognized their duty to repair the bridge by commencing so to do; and upon the ground that the *onus* was upon them to show that they had no funds.

MOTION for a new trial, on exceptions ordered to be heard in the first instance at the General Term.

The plaintiff sued to recover for the loss of a horse, drowned in a stream crossing the highway in the town of Pavilion.

Several weeks prior to the occurrence, which took place July 17th, 1873, the defendants, who were commissioners of highways in that town, caused the plank covering to be removed from one of the bridges, which had become so worn and decayed as to be unsafe. The defendants had drawn a quantity of stone to the ground, for the purpose of repairing the abutments of the bridge, and with these had secured the approaches to it, so that people could not drive into the opening. On the east of the bridge, and within the highway, good approaches had been graded by the defendants,

from the bed of the creek each way, so that teams could easily and safely cross the run. On the 17th of July, 1873, the plaintiff crossed the creek in a one horse wagon about four o'clock, P. M. At this time the brook was dry. At six o'clock that afternoon, a severe rain storm came on, with thunder and lightning, which lasted two or three hours. The run was flooded, its banks overflowed, and the current was very swift. At about ten o'clock, at which time it was very dark, plaintiff attempted to cross the stream. The current swept the wagon down against the bridge abutment, took the horse off his feet, and he was drowned.

The other facts are stated in the opinion.

M. H. Peck, for the plaintiff.

R. Ballard, for the defendants.

E. DARWIN SMITH, J.:

The motion for a nonsuit, at the close of the plaintiff's case, was made upon three grounds, then stated. First, on the ground that the plaintiff had shown no negligence on the part of the defendants, in the discharge of their duty. Second, on the ground that the plaintiff was guilty of negligence in driving into the stream at the time of night he did, it being a dark night, and the stream flooded, as it was, which negligence contributed to the injury. And third, that if the defendants could in any way be liable for negligence in the discharge of their duty, it could only be upon proof that there were funds in their hands, appropriated for the purpose of making repairs of roads and bridges; and no such proof had been given. The circuit judge granted the nonsuit, on the last mentioned ground. The particular ground upon which the learned judge granted the nonsuit, I think, is in accordance with the cases of *Gurlinghouse v. Jacobs*,* *Robinson v. Chamberlain*,† and *Hines v. The City of Lockport*.‡

But, if this action could otherwise be maintained, I should be inclined to hold, on this point, that it was too late for the defendants to raise that point, or that the presumption of the possession of funds was against them, upon the ground that they had recog

* 29 N. Y., 207.

† 84 N. Y., 389.

‡ 5 Lansing, 16.

nized their duty to repair the said bridge, practically, by taking off the plank upon it, and entering upon the work of repairing it, by getting out the necessary stones and drawing them upon the ground for the abutments of a new bridge, or upon the ground that the *onus* was upon the defendants to show that they had no funds.*

If the defendants were guilty of unreasonable delay in completing the work, so begun upon said bridge, they were doubtless liable to indictment for such breach of duty, but for a mere omission, for a brief period, to fulfill a public duty, they are clearly not liable to individuals, except where some special injury has resulted to them, from such neglect or omission. The injury must be proximate upon such neglect. In *Hover v. Barkhoof*,† the injury resulted from the falling in, or breaking down, of a bridge over the stream, negligently left out of repair and unsafe. In *Garlinghouse v. Jacobs*, the damages were caused, also, by the breaking down of the highway bridge, when the plaintiff was crossing it. In *Adsit v. Brady*,‡ the defendant negligently left a boat sunk in the canal, so that plaintiff's boat ran against it and was injured. In *Weet v. The Trustees of Brockport*,§ the defendants left a pit-hole open in the sidewalk, with no guard about it, or light to enable persons, passing upon the street, to see it, and the plaintiff ran into it in the night time; and, in all the cases I have seen, where public officers have been held liable for neglect, which consisted in the mere passive omission of duty, the action has been based upon some direct injury, suffered and resulting from such neglect. In this case, the plaintiff's injury was not proximate, or consequent upon the neglect of defendants to repair the bridge. It was the immediate result of his own negligence in attempting, in a dark night, to ford the stream, rapidly swollen by a sudden and severe storm, where it was otherwise ordinarily safe to drive, and where he had passed safely a few hours before, and knew intimately the ground and the situation of the highway, the bridge and the creek at that place. His injury did not result from the omission of the defendants to repair the bridge in question, in such a sense, and with such intimacy of connection with the cause of neglect alleged,

* *Ellis v. The Village of Lowville*, 7 Lansing, 494.

† 44 N. Y., 113.

‡ 4 HUl, 630.

§ 16 N. Y., 161.

as to furnish the basis for a cause of action. The nonsuit, we think, might properly have been granted upon either the first or second grounds upon which it was moved, and, the judgment being right, it should not be reversed upon an erroneous ground or reason. Judges who decide correctly, are not required to give good, or the best reasons for their decisions, and particularly where other proper grounds are, at the same time, presented for their consideration.*

A new trial should be denied.

Present—MULLIN, P. J., SMITH and GILBERT, JJ.

New trial denied.

NORMAN H. GALUSHA, APPELLANT, v. THE FLOUR
CITY NATIONAL BANK AND EDWIN M. LEWIS,
RESPONDENTS.

Promissory note — injunction to restrain transfer of — Service by publication.

This action was brought to restrain the defendant, the bank, from returning a promissory note, made by the plaintiff, to the defendant Lewis, and by him sent to the bank for collection. The suit was commenced after the maturity and dishonor of the note. Lewis resided in Pennsylvania, and had never been served with process, or in any way appeared in the action. The complaint alleged that the note was obtained by fraud, that the consideration for which it was given had failed, and that, "if said note is permitted to be returned to said defendant Lewis, it will be a means of annoyance to the plaintiff; it may get into the hands of innocent parties, who will be defrauded thereby, and it may, and doubtless will, be used to injure the plaintiff in his credit and in his business." *Held* (1.) That the plaintiff had a perfect defense at law. (2.) That the facts stated did not justify an apprehension that Lewis would make an improper use of the note, and that plaintiff was not called upon to protect third parties who might be defrauded by Lewis. (3.) That the action could not be maintained, for the reason that Lewis had not been served with process. (4.) That an order of the Special Term, dissolving a temporary injunction granted in the action, was proper and should be affirmed.

* *Stevens v. Hyde*, 33 Barb., 171; *Beals v. Home In. Co.*, 36 Barb., 614; affirmed, 36 N. Y., 532.

APPEAL from an order of the Special Term, dissolving a temporary injunction granted in the action by the county judge of Monroe county. The facts are stated in the opinion.

John Van Voorhis, for the appellant.

Thomas C. Montgomery, for the bank, respondent.

GILBERT, J. :

The object of this suit is to restrain the defendant, bank, from returning a promissory note, made by the plaintiff, to the other defendant, from whom it received it, for the purpose of demanding and receiving payment thereof. The suit was commenced after the note fell due, and had been dishonored. Mr. Lewis, who sent the note to the bank, resides in Pennsylvania, and has not been served with process, or in any wise appeared in the suit. The note forms part of the estate of a bankrupt, and is held by Mr. Lewis as a special receiver, he having been appointed such by the District Court of the United States, for the Eastern District of Pennsylvania. It is not shown that the title to the note has been vested in Mr. Lewis, or that he claims any ownership in it. The averments on the part of the plaintiff, are, that the note was obtained by fraud, and that the consideration for which it was given, has failed.

We think the action ought not to be maintained. The note being over due, the plaintiff has a perfect defense at law. There appears to be no reason, therefore, for his coming into a Court of Equity to protect his rights. No doubt, the jurisdiction invoked, may be exercised ; but the granting of relief, in cases of this kind, is not by way of absolute right, but is a matter of sound discretion, to be exercised by the court as it thinks proper, according to the circumstances of each case. When it entertains jurisdiction of such cases, it is upon the principle, *quia timet*, or for fear that future injury or injustice might arise. The only allegation made by the plaintiff, on this subject, is, " that if said note is permitted to be returned to said defendant, Lewis, it will be a means of annoyance to the plaintiff ; it may get into the hands of innocent parties who will be defrauded thereby ; and it may, and doubtless

will, be used to injure the plaintiff in his credit and in his business." This is quite insufficient, if not altogether frivolous.

No facts are stated, justifying an apprehension that Mr. Lewis will make any improper use of the note. He who gives a note, and does not pay it, must expect annoyance and injury to his credit, arising from those circumstances, even though payment was rightly refused; but they scarcely afford adequate cause for the interposition of the extraordinary powers of a Court of Equity. Nor is the plaintiff called upon to protect the innocent parties, who, he says, may purchase the note, and may thereby be defrauded. Upon this ground, alone, we think the injunction was improperly granted, as a discovery is no longer needed or allowed, to enable a party to establish his defense at law.*

It is also an insuperable objection to the continuance of the injunction, that jurisdiction of the person of Mr. Lewis, has not been acquired; and that, under the facts, as they now exist, cannot be obtained.

For obvious reasons, the fourth subdivision of section 135 of the Code, does not apply to the case. The third subdivision of that section, contains the only authority to make service upon Mr. Lewis, by publication, and the case has not been brought within it.

1. It does not appear that he has any property in this State, except the note in controversy.

2. That note does not belong to him; but has been only temporarily intrusted to his care by the District Court, as one of its officers or agents.

3. A note sent forward for collection, to be returned immediately, if not paid, is not within the purview of the statute.†

The case then must proceed, if it proceed at all, against a mere agent, for the sole purpose of preventing his performance of a plain duty to his principal. We cannot sanction such a claim.

The motion to dissolve the injunction was regular. Although the county judge heard the parties before allowing it, it was still a preliminary order only, and was a proper subject of a motion to dissolve it, on bill and answer.

Without discussing the question of the power of the court to

* Mitchell v. Oakley, 7 Paige, 70; Crane v. Bunnell, 10 id., 841

† Haight v. Husted, 4 Abb., 848; S. C., 5 id., 170.

interfere with a receiver appointed in a foreign jurisdiction, therefore, we think the order appealed from must be affirmed.

Order affirmed.

WILLIAM C. HODGE, RESPONDENT, v. ALBERT R. SEXTON, APPELLANT.

Wager — Property staked on a bet — when title to, passes — Bona fide purchaser of — rights of.

One Smith fraudulently induced the plaintiff to stake his watch and chain upon a bet made with him, which bet the plaintiff lost through the fraud and deceit of Smith and his confederates. The watch and chain were delivered to Smith by the stakeholder, and subsequently purchased by the defendant. In an action brought by the plaintiff to recover the watch and chain, *held*, that he was entitled to recover; that by the delivery of the watch and chain to the stakeholder, the plaintiff did not intend to part with his property in them; that no authority was conferred upon the stakeholder to deliver the property to Smith, unless the bet was fairly won by the latter; and that defendant acquired no better title than that possessed by his vendor.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

This action was brought by plaintiff to recover possession of a watch and chain, of which he claimed to be the owner. The plaintiff bet the watch and chain against \$100, with one Smith, upon a throw of dice, at the same time placing them in the hands of a stakeholder, to be delivered to the winner. The plaintiff lost the bet, and the watch and chain were delivered to Smith.

On the trial, the plaintiff testified that he "did not direct the stakeholder to deliver the watch and chain to Smith;" that he "did not say anything about it," and that he "never authorized these parties to let defendant have them." The evidence showed a conspiracy upon the part of Smith and others to lure the plaintiff into making the bet, and that he was cheated in the transaction. The defendant, not knowing the manner in which Smith had obtained possession of the property, purchased it from him, paying therefor \$135.

The referee made a report in favor of the plaintiff, and judgment was entered thereon, awarding to him the possession of the watch and chain, or \$300, with interest, and six cents damages.

From this judgment the defendant appealed.

William Spargur, for the appellant.

William H. Gurney, for the respondent.

GILBERT, J.:

The only ground, on which it is claimed that this judgment should be reversed, is, that the plaintiff voluntarily parted with his property, and the defendant is a *bona fide* purchaser. We think the defendant cannot be deemed a *bona fide* purchaser, but that, even if he should be so regarded, no title to the goods in controversy passed to his vendor, and that, consequently, he got none by his purchase. It is very evident that the defendant did not intend to part with his property, but merely to permit the stakeholder to take possession of it, temporarily. If he had won the bet, the possession would have been resumed by him, and no authority to deliver the property over to his adversary, can be implied, unless the bet was fairly won by the latter. That the transaction was a gross cheat on the part of the winner, and was the result of a conspiracy between him and his confederates, admits of no question. A man cannot be divested of the title to his property by such means, and even an innocent purchaser from one who so obtains it, is not entitled to protection against the claim of the true owner. The cases where such protection has been afforded, rest upon the principle that when one has been induced to part with his property by fraud, the transaction is void, or voidable at his election. It is optional with him, either to affirm or rescind the contract. But such election must be exercised before the rights of third persons have intervened. In other words, the contract is valid until rescinded, and if, before it has been avoided, the goods have been sold to a *bona fide* purchaser, the latter is entitled to protection. But this rule does not apply, unless it appears that the owner intended to transfer both the property in, and the possession of, the goods to the persons guilty of the

fraud. If his intention was to deliver nothing more than the bare possession, there is no contract of sale, and the property does not pass.*

The counsel for the respondent contends that the facts establish that the plaintiff's property was stolen. There are cases which hold that when a man has been deprived of his property by means of a conspiracy to cheat him under color of a bet, and where the taking occurred under circumstances similar to those which exist in this case, it is larceny. Certainly the acts of the person, from whom the plaintiff purchased, and his confederates, involved the moral guilt of stealing, if they did not constitute the technical crime of larceny.† But we prefer to put our decision of this case upon the ground that no title passed.

For the reasons stated, and, without considering the effect of the statute against betting and gaming upon the transactions in controversy, we think the judgment should be affirmed.

Judgment affirmed.

WILLIAM E. MOORE, APPELLANT, v. NEWTON EASTMAN.
RESPONDENT.

Infants—contracts of—acts of—when sufficient to constitute a trespass.

To render an infant, who has hired a horse, liable in an action of trespass, he must do some willful and positive act which amounts to an election on his part to disaffirm the contract; a bare neglect to protect the animal from injury, and to return it at the time agreed upon is not sufficient. If he willfully and intentionally injure the animal, an action of trespass will lie against him for the tort, but not if the injury complained of occurred in the act of driving the animal through his unskillfulness and want of knowledge, discretion and judgment.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

This action was brought to recover against the defendant in

* Mowrey v. Walsh, 8 Cow., 233; Bassett v. Spofford, 45 N. Y., 386; Benj. on Sales, Bk. 3, Chap. 2, § 2.

† Roscoe Cr. Ev., 6th ed., 571, 575; Rex v. Robinson, R. & R. C. C., 413; People v. Jackson, 8 Park. Cr. R., 590.

trespass, for an injury to a horse of the plaintiff. The answer denies the complaint, and sets up a contract of bailment and infancy. Evidence was given on the part of the plaintiff, to show that he let the horse to the defendant for two days; that the horse was taken sick on the journey, and that such sickness was occasioned by over-driving. That the defendant, against the advice of the doctor and hotel keeper, drove the horse, while so sick, at a fast gait; and that shortly after the horse reached the plaintiff's stable, he died from the effects of such over-driving.

Holt & Hill, for the appellant.

T. P. Grosvenor, for the respondent.

GILBERT, J.:

The complaint avers a wrongful taking of the horse, by the defendant, and that, in consequence of his malicious, wicked and cruel treatment, the horse died. The defense is infancy, and that, at the time the alleged wrongful acts were committed, the horse was in the possession of the defendant, by virtue of a contract of bailment for hire, and that said wrongful acts occurred, solely, through the unskillfulness and want of judgment of the defendant, and not from any intentional, or malicious, or willful act or wrong on his part. The question is, what proof is requisite to a recovery upon such an issue. Acts, however aggravated, which merely establish a breach of the contract on the part of an infant, manifestly are insufficient. The plaintiff cannot convert anything that arises out of a contract with an infant, into a tort, and then seek to enforce the contract, through the medium of an action *ex delicto*. There must be a tort, independent of the contract. The authorities all agree on this principle. In *Jennings v. Rundall*,* it was held, that when a boy hired a horse, and injured it by immoderate driving, this was only a breach of contract, for which he was not liable. So, in *Green v. Greenbank*,† the Court of Common Pleas, in England, held, that an infant was not liable to an action for falsely and fraudulently deceiving the plaintiff, in an exchange of horses, because the deceit was practiced in the course of the con

* 8 T. R., 335.

† 2 March, 435.

tract. The principle of these cases was unanimously approved by the late court for the correction of errors, in *Campbell v. Stakes*,* which was an action of trespass for misusing a mare, hired by the defendant, who was an infant. It was held in that case, that a bare neglect to protect the animal from injury, and to return it at the time agreed upon, would not subject an infant to an action of trespass, but that the infant must do some willful and positive act, which amounts to an election on his part to disaffirm the contract; that if the infant willfully and intentionally injured the animal, an action of trespass would lie against him for the tort; but that if the injury complained of, occurred in the act of driving the animal, through the unskillfulness and want of knowledge, discretion and judgment of the infant, he would not be liable. The rule thus established, has not been changed in this State, to my knowledge, but, on the contrary, has been repeatedly recognized and approved.† What then is the willful and positive act, which amounts to an election to disaffirm the contract? Certainly, such an act cannot be predicated of a use of the animal in the course of the bailment, however excessive, unless the excess was such as to indicate that it was resorted to for a purpose beyond that for which the horse was hired. Nothing of that kind appears in this case. Instances of the kind of wrong that will make an infant liable, are not wanting in the adjudged cases: *Burnard v. Haggis*,‡ where an infant hired a mare, on the terms that it was to be ridden on the road, and not over fences in the fields, and the infant lent it to a friend, who took it off the high road, and, in endeavoring to jump the animal over a fence, transfixed it on a stake and killed it; *Towne v. Wiley*,§ *Homer v. Thwing*,| *Lucas v. Trumbull*,¶ and *Fish v. Ferris*;** where the infant drove the horse further than the stipulated journey, or on a different one; and cases where an infant obtains goods by fraud, and then refuses to deliver them up on the demand of the party who has been defrauded, or where he has been intrusted with them for a special purpose, and has per-

* 2 Wend., 187.

† *The People v. Kendall*, 25 Wend., 399; *Munger v. Hess*, 28 Barb., 75; *Robbins v. Mount*, 4 Robt., 553.

‡ 14 C. B., N. S., 45.

§ 23 Vt., 355.

| 8 Pick., 492.

¶ 15 Gray, 307.

** 5 Duer, 49.

verted them to another purpose, may be taken as examples. They are all consistent with, and at least furnish a negative confirmation of, the principle before alluded to, that a mere violation of a contract, though attended with tortious results, will not make the infant liable, but that, to have that effect, the act must be wholly tortious.

In the case before us, taking the evidence on the part of the plaintiff alone, the defendant is fairly chargeable with only two or three acts of immoderate driving of the horse, while performing the service for which he was hired, and with driving him when not in a fit condition to continue that service. There was no other basis for the inference that the injury to the horse was positive or willful.

The question whether the injury was of that character, or was the result of indiscretion, or want of skill and judgment on the part of the defendant, was fairly submitted to the jury, and we think their verdict was correct.

Several requests were made to the judge to modify his charge. One of them was, that if the jury should find the horse was overdriven, and in a cruel and unusual manner, they might infer the intent from such cruel driving. This was properly refused, because there was no evidence of such cruelty. The other requests, though variant in form, presented merely the converse of the propositions embraced in the judge's charge, and, of course, were properly refused.

The judgment must be affirmed.

Judgment affirmed.

DANIEL W. POWERS, RESPONDENT, v. JOHN M. FRENCH,
JR., IMPLEADED WITH MARY FRENCH, APPELLANT.

Promissory note—Accommodation indorser—bona fide purchaser of note indorsed by—Consideration of, presumed—Pleadings—effect of admissions in.

A party having notice of the fact that a note has upon it an accommodation indorser, and who does not part with anything upon the faith of its transfer to him, stands in no better position than the maker, and cannot recover thereon against the indorser.

The distinction between a promissory note and other contracts, is, that in the former a consideration will be presumed, and in the latter it must be proved.

An admission in the answer, of the making, indorsement and transfer of a promissory note, does not preclude the defendant from showing that there was no consideration; that the indorsement was lent; and that the consideration paid by the plaintiff was in fact the money of the party to whom the indorsement was lent.

AN appeal by the defendant from a judgment entered on a verdict at the Monroe Circuit.

This action was brought to recover the amount of a promissory note, alleged in the complaint to have been made by the defendant, Mary French, and delivered by her to the defendant John M. French, Jr., "who thereupon indorsed the same and sold and delivered the same, for a valuable consideration, to the plaintiff."

The defendant John M. French, alone answered. He set up in his answer, and offered to prove on the trial, that on the 27th day of May, 1865, the plaintiff had in his hands \$2,600 belonging to John M. French, Sr., which was held by him in trust for the benefit of said French, Sr.; that upon that day said French, Sr., applied for the payment of said sum of \$2,600; that the plaintiff stated that for certain reasons he desired the payment to be in the form of a loan to said French, Sr., and suggested that he procure the promissory note for that amount of his, said French senior's, wife, and the indorsement of his son, John M. French, Jr.; that accordingly, the said Mary French, wife of French, senior, made the note mentioned and described in the complaint, at his request, and the defendant, John M. French, Jr., indorsed it at his request, and that he then presented it to the plaintiff, who delivered to him the said sum of \$2,600, which he had in his hands in trust, and that the note had no other or different consideration. The answer con

tained no further matter, nor any denial of the allegations of the complaint. The court excluded the evidence offered, and decided that the answer did not set up a sufficient defense, and directed a verdict for the plaintiff.

W. F. Cogswell, for the appellant.

George F. Danforth, for the respondent.

GILBERT, J.:

Construing the defendant's answer liberally, as we are required to do,* it sets up the defense that the note in suit was made and indorsed without any consideration, but at the request, and solely for the accommodation, of the defendant's father; that all this was done upon the suggestion of the plaintiff, and that all the consideration which the plaintiff paid for the note, was the father's own money. For the purposes of this appeal, the answer must be taken as true. Unless, then, he, who borrows a promissory note, can enforce payment of it against the lender, it is difficult to perceive why the facts stated would not defeat the action. The plaintiff is in no sense a *bona fide* holder. He had notice of the purpose for which the note was made and indorsed, and he parted with nothing upon the faith of the transfer thereof to him.

Under such circumstances, the plaintiff stands in no better position than the father would have occupied if he had retained the note, and given the plaintiff a voucher for the money which he received from the latter, in some other form. Want of consideration in a promissory note, will defeat a recovery, where the action is between the parties to it, or where it is brought by a transferee, affected with notice. The only distinction between promissory notes and other simple contracts, in this respect, is, that in the case of the former, unless the transaction be affected with fraud or the like, a consideration will be presumed until the contrary be shown: while in the case of the latter, it must in general affirmatively appear that there was a consideration therefor.†

* Code, § 159.

† 2nd Gr. Ev., § 172; Story, Prom. Notes, § 181; Story, Bills, § 178; Byles, Bills, § 76, 3d ed.

The defendant could not deny, and therefore had to admit, the making, indorsement and transfer of the note, as alleged in the complaint. His omission to deny those allegations, had that effect—no more. Stretching the admission to the utmost, its only effect was, that the note, by its terms, imported a consideration, and that the defendant, by his indorsement in blank, sold and delivered it to the plaintiff for a valuable consideration. The allegations of the complaint related to nothing *aliunde* the written instrument. The admission of them proved nothing more than that which the law would have presumed from the production of the note, or from pleading it according to the legal effect of the contracts of the maker and indorser respectively. The allegation, respecting the sale and delivery of the note to the plaintiff, does not necessarily imply that such transfer was made directly by the defendant, and consequently does not involve an averment (contrary to the fact) that the consideration was received by the defendant. So understood, the defense does not contravene the admission, but is merely one, *sub modo*, and is qualified by the facts stated in the answer.

Those facts were offered to be proved on the trial, and we think they would have established a complete defense, by showing that there was no consideration whatever for the note; that it was in fact lent to the elder French; and that, although a valuable consideration was nominally paid for it by the plaintiff, such consideration in fact proceeded from the elder French, and that the transaction was contrived by the plaintiff.

Taking the case as thus represented, there can be no pretense of a right of recovery against the plaintiff by the elder French, for the money received by the former, belonging to the latter. Those moneys were in fact paid by the plaintiff to the elder French, and the effort to make the transaction assume the form of a purchase of a void note, was simply nugatory.

The judgment must be reversed, and a new trial granted, with costs to abide the event.

Judgment reversed and a new trial granted, costs to abide the event.

MARY A. CODDING, APPELLANT, v. THOMAS
WAMSLEY, RESPONDENT.

Contract—time, when of the essence of—Specific performance—reciprocity of obligation not necessary—Distinction between mutual obligations and those obligatory on one party only.

When the obligation to sell real estate rests on one party, and it is optional with the other party to purchase or not, a specific performance of the contract will not be decreed, if the party does not exercise his option within the time given him.

Time will be deemed of the essence of a contract which gives a mere right of election to purchase real estate upon certain conditions.

APPEAL by plaintiff from a judgment entered on the report of a referee, dismissing the complaint in an action brought for the specific performance of a contract for the purchase of a house and lot in the city of Rochester. On the 1st day of April, 1871, the respondent, by written lease, demised and rented to the appellant a house and lot of land in Rochester, for one year, at the yearly rent of \$1,200, to be paid monthly in advance. In the instrument, it was further agreed and covenanted by said Wamsley, that at any time within three months from the date thereof, the appellant might become the purchaser and owner in fee of said lot of ground, for the price of \$9,500, with interest, and all taxes, assessments, etc., levied or charged thereon. Of this sum, \$3,000 were to be paid immediately at the expiration of the three months, \$3,000 to be paid by assuming a bond and mortgage on the premises, and \$3,000 to be paid within one year from the date of the instrument.

The plaintiff paid the rent monthly in advance, up to and including November 1, 1871, and also paid taxes and insurance to the amount of \$56.61. Nothing more was paid, nor did plaintiff assume the mortgage or offer to do so, or to pay any money, except in and by the complaint in this action, which was commenced in August, 1872, nor did she pay any taxes or assessments except those above mentioned.

The defendant, after the expiration of the three months, expressed to plaintiff's agent a willingness to receive the \$3,000, but made no agreement to do so, and declined to extend the time for

her to become the purchaser. In February, 1872, the plaintiff, by her agent, told the defendant to have the papers made out, that the money was ready. The defendant refused to convey the property at the price specified in the contract.

H. R. Selden, for the appellant.

Davison & Chumaseo, for the respondent.

GILBERT, J. :

At one time, a purchaser was not allowed to maintain a bill against the seller, for the specific performance of a contract to sell lands, unless he himself was bound by the same contract to purchase. Reciprocity of obligation was necessary. * But this rule, it seems, is not now in force. All that is requisite, is that the contract on the part of the seller, be founded upon a sufficient consideration, and be made conformably to the requirements of the statute of frauds. If these facts concur, and the circumstances be such as establish a right to equitable relief, the fact that the contract was not mutually binding, is no longer an insuperable bar, although it is a material ingredient in restraining the exercise of the equitable jurisdiction of the court. The plaintiff, by filing the bill, makes the remedy mutual, and, therefore, the objection to a decree to compel the performance of a unilateral contract is taken away. †

The contract in this case, is not an absolute one to sell, but gives to the plaintiff merely an option, or right of election, of becoming the purchaser of the lands, at any time within three months from the date thereof. The plaintiff did not avail herself of the privilege thus given, within the time limited. The court is now asked to say that the time specified, is not of the essence of the contract, and that the option may be exercised after such time. We cannot accede to that proposition. It would, in effect, make a new contract for the parties.

In ordinary cases of contracts between vendor and purchaser,

* Newland on Cont., 153 ; Fry on Spe. Per., § 286 *et seq.*; Fonb. Eq., Bk. 1, C. 6, § 13.

† Adams Eq., 82; Batten Cont., Chap. 5; Willard Eq., 267; Justice v. Lang, 42 N. Y., 492, and cases cited on this point; *sed vide* S. C., 52 id., 323.

the time fixed for the payment of the purchase-money, is not of the essence of the contract, unless the parties themselves have, either expressly or by reasonable implication, agreed that it shall be so considered. The reason is, that the contract gives a present interest in equity, and forfeitures are odious. In this case, however, the defendant has agreed to convey, only upon condition that the plaintiff shall perform the requisite acts on her part, within three months. The plaintiff not being bound to purchase, it would be inequitable to hold the defendant bound to sell, after the time fixed by the contract; for, by so doing, the defendant would be held to a performance if disadvantageous to him, and yet, if advantageous to him, he could not compel a performance by the plaintiff. It is not an answer, to say that the plaintiff agreed to pay an excessive rent, as a consideration for the option granted to her. That was the *quid pro quo*, for the privilege conferred. It was competent for the parties to agree upon any consideration therefor. It appears that the defendant, acting under advice of counsel, took special pains to avoid incurring the obligations of a vendor in an ordinary contract of sale. The language of his covenant effectually secures that object. Straining it to the uttermost, it is a covenant, contained in a mutual contract, to give an option or right of purchase, and gives no present interest. There being nothing in the nature of the contract, contrary to law or equity, we ought to give it effect, accordingly. And such is the rule, governing the exercise of the jurisdiction of the court, in this class of cases. It is stated in *Story's Eq. Jur.* (§ 777 a, 11th ed.) as follows: "But notwithstanding the rule is well established in courts of equity, that time will not be regarded as indispensable, in regard to decreeing specific performance of contracts for the actual sale of lands on one side, and the actual purchase on the other, it is different where the contract gives a mere election to purchase upon certain conditions. Accordingly, where upon a lease, with the right of purchase within seven years, upon giving three months' notice, and paying a fixed sum at the expiration of such notice, and the lessee gave the requisite notice, but did not pay the money in time, a bill for specific performance was dismissed. And a similar decision was made by the Lord Chancellor, where his Lordship said: 'The things required must be done in the order of

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in circumstances, it is impossible to hold that
 or.

power, on this appeal, to reform the contract, even
 showed proper grounds for such a decree.
 judgment must be affirmed.

ent affirmed.

ALICE E. CHISM, APPELLANT, v. ELLEN H. KEITH AND
 OTHERS, RESPONDENTS.

*Partition — action for, may be maintained by vested remainderman — effect of, on
 contingent interests of persons not in esse — Vested remainder — what creates.*

The provisions of a will, by which real property is given to "the heirs of the
 body of A., whom she shall leave her surviving," give to the devisees, during the
 lifetime of A., a vested remainder in fee, liable to open and let in after-born chil-
 dren, and liable, also, to be defeated by the death of any devisee before the
 decease of A.

One who is entitled to such a vested remainder in lands is in possession of his
 undivided share, within such meaning of the statute relating to actions for partition
 of lands, although there is a life estate covering the whole lands, and the life
 tenant is in possession.

Future contingent interests of persons, not *in esse*, may be barred by a sale under
 a judgment in partition.

Moore v. Little (41 N. Y., 76) followed.

APPEAL from an order made in an action brought for the parti-
 tion of certain real property between the plaintiff, a child of Ellen
 H. Keith, and the defendants (who are the said Ellen H. Keith,
 one Shades, a tenant, and seven others, the other children of Ellen
 H. Keith), claiming title thereto under the provisions of the will
 of Arabella Baldwin, by which the property was given to Ellen
 H. Keith, a daughter of the said Arabella Baldwin, to have and to
 hold the same during her natural life, and, after her death, to "the
 heirs of the body of said Ellen H. Keith whom she shall leave her
 surviving."

The action was brought during the lifetime of Mrs. Keith.

A motion was made in the progress of the action, to confirm
 the report of a referee, and for an order directing a sale of the
 property.

The court, at Special Term, denied the motion, on the ground that, as the plaintiff was neither in possession nor entitled thereto, she could not maintain the action.

L. A. Hayward, for the appellant.

1st. The plaintiff in this action has a vested remainder in fee in these premises. (*Moore v. Littel*, 41 N. Y., 76; *Howell v. Mills*, 7 Lans., 193; *Mead v. Mitchell*, 17 N. Y., 213.)

2d. She has such possession as entitles her to institute proceedings for partition. (*Blakeley v. Calder*, 15 N. Y., 617; *Burhans v. Burhans*, 2 B. Ch., 408; *Jenkins v. Van Schaack*, 3 Paige, 242; *Howell v. Mills*, 7 Lans., 193.)

3d. It is no objection to this action that the estate of the plaintiff is liable to be divested by her death. (*Howell v. Mills*, 7 Lans., 193; *Mead v. Mitchell*, 17 N. Y., 217; *Moore v. Littel*, 41 N. Y., 82, 83.)

In *Clemens v. Clemens* (37 N. Y., 70), and also in *Adams v. Fox* (40 N. Y., 580), the case of *Mead v. Mitchell* is cited with approval.

L. W. Thayer, for infant respondents.

GILBERT, J.:

If the decision of the Court of Appeals, in *Moore v. Littel*,* is to be taken as a correct exposition of the law, the devise in this case, to "the heirs of the body of Mrs. Keith whom she shall leave her surviving," created a vested remainder in fee, in the present plaintiff, and her brothers and sisters. No sensible distinction on this point, can be drawn between the two cases. Such remainder is liable to open and let in after-born children of Mrs. Keith, and is liable also, in respect to the share of any child now living, to be defeated by his or her death before the death of Mrs. Keith. Such is the rule of law laid down in *Moore v. Littel*. It is a rule of property. We have no alternative but to follow it, whatever may be our own views of its correctness.

The future contingent interests of persons, not *in esse*, may be effectually barred by a sale under a judgment in partition.†

* 41 N. Y., 76.

† *Mead v. Mitchell*, 17 N. Y., 210; *Clemens v. Clemens*, 37 id., 59; *Noble v. Cromwell*, 27 How. Pr., 289; *Brevoort v. Grace*, 53 N. Y., 245.

If, therefore, a suit in partition may be maintained in behalf of a vested remainderman, the order appealed from is erroneous. Partition between tenants in common of real estate, is matter of right by common law as well as by statute.*

And it must now be deemed settled, that one, who is entitled to a vested remainder in lands, is in possession of his undivided share, within the meaning of the statute, notwithstanding there is a life estate, covering the whole premises, and the tenant for life is in actual occupancy thereof.†

It follows that the order appealed from must be reversed.

Order reversed.

EDWARD F. DOWNER AND LE ROY F. SHEPARD,
RESPONDENTS, v. ALEXIS C. CARPENTER AND JOHN
BAIRD, APPELLANTS.

Agent—acts of, in excess of authority—principal not bound by, to party who has not sustained injury thereby.

By the act of an agent within the general scope of his employment, but in excess thereof, the principal is not bound to a third person who has rightfully believed the agent was acting within his authority, unless such third person has sustained some loss by reason of such act of the agent.

APPEAL from a judgment entered upon the report of a referee in favor of the plaintiffs, in an action for goods and merchandise sold to defendants by plaintiffs.

The referee in this case found that the plaintiffs had sold goods to the defendants, in the amount, and on the credit mentioned in the complaint, and that on the 23d day of January, 1872, there was due to plaintiffs on account of such goods and merchandise so sold, the sum of \$133.50.

That prior to February 1, 1872, and on that day, one David Gormly was the traveling agent of the plaintiffs, and was author-

* Allen on Part., 4, 78, 87; Smith v. Smith, 10 Pal., 470; Van Arsdale v. Drake, 2 Barb., 599; Haywood v. Judson, 4 id., 238.

† Howell v. Mills, 7 Lans., 193, and cases cited; S. C., Court of Appeals, MS.

ized to collect outstanding bills in cash, but was never to receipt an account for which a note should be taken by him, but was, in every instance, to send the note to the plaintiffs for their approval, and they were to determine whether to accept the note and settle the account.

Gormly, on February 1, 1872, called on defendants and presented the plaintiffs' account against them; defendants proposed to give their note for the amount, payable in sixty days, to which Gormly assented, and received the note, as he stated, in settlement of the account, but gave no receipt for the account or for the note, as being given in settlement. Subsequently, and on the afternoon of the same day, the plaintiffs, having no knowledge of the transaction by Gormly, caused to be served on the defendants, a summons and complaint in the action brought for the recovery of the amount due on the account.

The note was sent by Gormly to the plaintiffs, and by them returned to the defendants.

Vary & Stone, for the appellants.

Lewis H. Babcock, for the respondents.

GILBERT, J.:

The referee finds that the authority of Gormly, the agent, did not empower him to take the note, so as to extend the time of payment, without the approval of the plaintiffs, and that the plaintiffs refused to approve. There is evidence sufficient to sustain these findings, and, as the case does not show that all the evidence is set forth, we cannot review the findings.

The taking of the note, therefore, had no legal effect on the original demand. If the defendants had sustained any loss, in consequence of the agent's act in excess of his authority, they might have been protected, upon the principle that where the agent's act was within the general scope of his employment, but in excess thereof, the principal is responsible to a third person, who, having rightfully believed the agent was acting within his authority, would sustain a loss if the act were not considered the act of the principal. But this rule is applicable only where the question is, which of two

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innocent parties ought to bear a loss resulting from the agent's misconduct.

The judgment must be affirmed.

Judgment affirmed.

THE PEOPLE *EX REL.* LESTER B. FAULKNER v. THE
TRUSTEES OF THE VILLAGE OF DANSVILLE.

Certiorari—*what errors may be reviewed by*—*Chap. 285, 1873—constitutionality of*
—*Sec. 16, Art. 3, of the Constitution.*

In 1873, an act was passed, entitled, "An act to authorize the village of Dansville to create a debt for the purpose of bringing water into said village for protection against fires, and to amend the charter of said village." The first four sections of the act authorized the trustees to introduce water into the village, and to create a debt and issue bonds to the amount of \$35,000; the remaining sections amended various portions of the charter of the village. *Held*, that the act did not violate section 16 of article 3 of the Constitution.

That the act was, in substance, one to amend the charter of the village, and that the conferring of power to create a debt for the purpose of supplying the village with water, is only one of the elements of this general subject which is stated in the title.

CERTIORARI to review the proceedings of the trustees of the village of Dansville, in issuing certain bonds to defray the expense of introducing water into the village.

In 1873, the legislature passed an act, chapter 285, entitled, "An act to authorize the village of Dansville to create a debt for the purpose of bringing water into said village for protection against fires, and to amend the charter of said village." The first four sections of this act authorized the trustees of the village to create a debt, and issue bonds for the purpose of introducing water into the village. The remaining sections of the act amended in various particulars the charter of the village. The trustees were required to cause a survey, plan and estimate of the expense of the water-works, to be made and published in all the newspapers; and section 4 provided that "no debt shall be created under the provisions of this act other than for the expenses provided for in the

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FOURTH DEPARTMENT, JUNE TERM, 1874.

last foregoing section, until the statement aforesaid has been published as aforesaid, nor until the question of the creation of said debt has been submitted to the tax-payers of said village, at an election to be called for that purpose, and at which a majority of such tax-payers present and voting at such election shall have voted in favor of the creation of such debt. The trustees shall fix the time and place of such election and the form of the ballot to be used thereat." * * * The trustees passed a resolution submitting to the tax-payers the question whether or not the debt should be created, and prescribed a time and place for voting. The ballots were indorsed on the outside, "Dansville Water-works," and on the inside, "For Water-works," or, "Against Water-works." The relator insisted that from the form of the ballots used, the question, whether or not a *debt* should be created, was never passed upon by the people.

Solomon Hubbard & H. R. Selden, for the relator.

John A. Vanderlip, for the respondent.

GILBERT, J.:

We think the writ of *certiorari* should have been directed to the board of trustees, instead of the corporation, and that the return should have been made by them, or by the clerk. By the eighth section of the village charter, the trustees are required to form a board, and the next section requires the clerk to attend all meetings of such board; to record their proceedings; and to deliver such record over to his successors.*

But, as an amendment of this defect might be allowed, we will consider the material objections of the relator to the proceedings returned.

It is said, the statute which authorizes the proceeding violates section 16 of article 3 of the Constitution. We shall not spend much time on this, for the learning pertaining to it has been pretty nearly exhausted in previous cases. We think this act fairly meets the test declared in the last reported decision of the Court of Appeals on this subject, namely, that "if the title of an act

* Laws 1853, 638; Re Mt. Morris Square, 2 Hill, 23; 6 Abb., 151.

fairly and reasonably announces the subject, and that is a single one, and if the various parts thereof relate to that, it is sufficient" * *

The act is, in substance, one to amend the charter of the village. The conferring of power to create a debt for the purpose of supplying the village with water, is only one of the elements of the general subject. All the provisions of the act are appropriate to an amendment of the charter, and no matter how many particulars are embraced in the statute, they together constitute but one subject. Nor is it material that the title mentions one of those particulars and omits the others, since it does state that it is an act to amend the charter.

It sufficiently appears that a survey and estimate were made and published, as provided by sections 3 and 4 of the act. But, if there were irregularities in these parts of the proceedings, they were not of a kind that can be corrected by a *certiorari*, being merely executive or ministerial acts. It is urged that the tax-payers have not voted in favor of creating the debt. We think otherwise. A resolution was passed and published, setting forth the question to be voted on, and the form of the ballot to be used. The form of the ballot was wholly within the control of the trustees, and there is no evidence before us that they intended any deception, or that anybody was deceived by it. If such evidence had been given, it would not have furnished ground for reversing the proceedings, because it would have shown a legislative error, and not a judicial one, in its character.

For the reason last stated, the other errors alleged, namely, the change of plan and of pipes, cannot be reviewed upon a *certiorari*.

Upon the whole case, the writ must be quashed, with costs to be paid by the relator.

Writ quashed.

* Re Mayer, 50 N. Y., 504.

STEPHEN COLEMAN, PLAINTIFF IN ERROR, v. THE PEOPLE,
ETC., DEFENDANTS IN ERROR.

Receiver of stolen goods — Scienter — what evidence of, allowed — Declarations by prisoner as to collateral facts — when their falsity may be shown.

Evidence of transactions of the prisoner, other than those connected with the offense charged, may be given for the purpose of proving guilty knowledge.

On the trial, the prosecution was permitted to give evidence of declarations of the prisoner, respecting collateral facts bearing more or less directly upon the question in controversy, and then to prove that such declarations were untrue — Held not to be error.

WRIT of error to the Court of Sessions in and for the county of Monroe.

The plaintiff in error was indicted in the Monroe Oyer and Terminer, in April, 1873, and, by an order of that court, the indictment was sent to the Monroe County Sessions, and in December, 1873, he was tried in the latter court.

The indictment charged, that on March 3, 1873, the prisoner received five bars of pig-iron, knowing them to have been stolen. The evidence tended to show that on March 10, 1873, Dennis and Daniel Connors stole five bars of pig-iron from P. Burke & Co., and sold the same to Coleman for four dollars; that while the Connors were waiting for their pay, other parties, who had stolen them, brought to Coleman, and sold him, twenty more bars of P. Burke & Co.'s pig-iron. It also tended to show other larcenies by these persons and sales of the results to the prisoner, under suspicious circumstances, for some time previous to March tenth.

J. C. Cochrane, for the plaintiff in error.

George Raines, District Attorney, for the people.

GILBERT, J. :

The prisoner was convicted of having received from two boys, named Dennis and Daniel Connors, five bars of pig-iron, stolen by them from Burke & Co., knowing that they had been stolen. His guilt was clearly established, and no honest jury could have failed to convict him. It is now sought to reverse the conviction

on several grounds. First, it is objected that evidence of other transactions with other persons than the two boys mentioned, amounting to distinct offenses, was received. This evidence was admitted for the purpose of proving guilty knowledge on the part of the prisoner, and was confined to purchases of pig-iron by the prisoner, from confederates of the Connors boys. These purchases were so connected with the act charged in the indictment, as, with it, to form a chain of facts constituting together a single course of business. Evidence of this kind, illustrative of the *scienter*, has often been admitted, and, in many cases, is indispensable to the attainment of justice. The general rule, no doubt, is, that evidence must be confined to the issue. But the evidence objected to, within proper limits, is no infringement of the rule, for it bears directly upon the main point to be determined, namely, the knowledge of the prisoner that the property, charged in the indictment, had been stolen. We think the admissibility of such evidence in a case like the present, is fully sustained by authority.*

The prosecution was also permitted to give evidence of declarations of the prisoner, respecting collateral facts bearing more or less directly upon the question in controversy, and then to prove that such declarations were untrue. We do not perceive any fatal error in this. It bore somewhat on the question of the guilty knowledge of the prisoner, and therefore was not irrelevant or immaterial. Nor did the admission of it violate the rule against allowing a contradiction of evidence upon collateral matters, by the party giving it. That rule is confined to the testimony of witnesses, and does not embrace the declarations of parties. Several other exceptions to the admission of evidence were taken, but they are too unimportant to require comment. We are satisfied that the result would have been the same, if the evidence, last referred to, had been excluded, and, therefore, the admission of it, even if erroneous, would not justify a reversal of the conviction.†

The request made to the court, to charge the jury that the prosecution was confined to the larceny of the five bars of iron, March

* 2 Russ. on Crime, 777; Gr. Ev., § 58; Wheat. Cr. Law, 7th ed., §§ 1889, 639, 647; Osborne v. The People, 2 Park O. R., 588; People v. Wood, 3 id., 681; People v. Hopson, 1 Den., 574; Rex v. Ellis, 6 B. & C., 145.

† People v. Gonzalez, 35 N. Y., 49, 59; Vandevoot v. Gould, 36 id., 689, 644.

eleventh, and that, as there was no proof that the Connors were engaged in it, the jury were bound to acquit, was too broad. The court could not properly be required to charge that there was no proof that Dennis and Daniel Connors were engaged in that larceny, or that the jury were bound to acquit. The request therefore was properly refused.

We are satisfied that the defendant was legally and justly convicted, and that the judgment should be affirmed.

Judgment affirmed.

ISAAC BUTTS, RESPONDENT, v. THE CITY OF ROCHESTER,
APPELLANT.

Assessments — Variance between provisions of city charter and ordinance of common council thereunder — when material.

The charter of the city of Rochester required the expense of local improvements to be assessed on the land, but also made it a charge against the owner, and gave authority to collect it from him. It also provided that all assessments thereafter made should be valid, notwithstanding any irregularity, omission, etc. The common council passed an ordinance directing that the expense of a local improvement be defrayed by an assessment on the owners of the lots benefited. *Held*, that it was not material that the ordinance was not couched in the precise language of the charter, and that at most it was an irregularity which was cured by the provisions of the charter.

APPEAL from a judgment, entered on the report of a referee in favor of the plaintiff.

The property of the plaintiff was levied upon by virtue of a warrant issued by the authorities of the city of Rochester, to collect an assessment alleged to have been made to defray the expense of constructing a bridge over a race on the west side of the Genesee river. To obtain a release of the property, plaintiff paid the assessment, and brings this action to recover back the money so paid.

The assessment, it was claimed by the plaintiff, was illegal and void, the ordinance of the common council being, as was claimed, in violation of section 7 of chapter 718 of the Laws of 1870, which requires the common council to make an order that the assessors

"make an assessment upon all the lots and parcels of land within the portion or part so designated, of the amount of expense," etc. The ordinance directed that "the whole expense shall be defrayed by an assessment upon the owners and occupants of houses and lands to be benefited thereby," and the assessors were "directed to make an assessment upon all the owners and occupants of lands and houses within the portion or part of said city so designated," etc. Section 13 of chapter 718 of Laws of 1870, provides that "all assessments and re-assessments heretofore made, or that hereafter may be made, for improvements in said city, shall be, and are hereby declared to be, valid and effectual, notwithstanding any irregularity, omission or error in the proceedings relating to the same."

The other statutes on this subject are stated in the opinion.

James Breck Perkins, for the appellant.

James L. Angle, for the respondent.

GILBERT, J. :

The learned referee put his decision upon the ground that the only assessment which the common council could lawfully cause to be made, was one that should create a charge upon lands only, and not one which would create a personal liability against the persons named in the roll, to pay the sums assessed. In this we think the referee erred. It is true that the charter of the city, as amended in 1870 (§ 192), requires that the ordinance authorizing the improvement, shall direct the assessment to be made upon all the lands and parcels of land, within the district of assessment, in proportion, as nearly as may be, to the advantage which each shall be deemed to receive by the making of the improvement. Before the amendment of 1870, the charter required that such ordinance should direct the assessment to be made on all the owners and occupants of lands and houses within the district of assessment,* and the mode in which the assessment should be prepared and authenticated, was, and still is, specifically declared. The assessors were to make an assessment roll, in which should be entered the names of the persons assessed, the value of the property for which they were

* Laws 1861, p. 330, § 192.

assessed, and the amount assessed to them respectively.* The act also provided that city assessments should be collected in the same manner as the annual city taxes—that is, by distress and sale of goods and chattels,†—and that whether assessed upon lands, or upon owners and occupants, they should be and remain a lien on the real estate, in respect to which they were made.‡ It also provided, that in the absence of an agreement to the contrary, the owner or landlord, and not the occupant or tenant, should be primarily liable for the payment of every such assessment.‡‡ These provisions of the act of 1861, have continued in force through all succeeding alterations of the charter. The only important change on this subject, is that alluded to in respect to the ordinance. The amendatory act of 1870,§ declared that an assessment for a public improvement should create a personal obligation or liability against the owner of the lot or parcel of land assessed, to pay the city of Rochester the amount thereof, and authorized an action for the collection thereof, in addition to any other remedies for enforcing such collection.

The language of these enactments seems to us to manifest an intent on the part of the legislature to make an assessment for a local improvement, whether in form made against owners and occupants, or upon lands, binding personally on the individuals, as well as a charge upon the lands assessed. We can give the statute no other construction. There can be no longer any question of the validity of this kind of legislation. An assessment like the one under consideration, is an exercise of the taxing power,¶ and must be submitted to accordingly. Whether the proceeding be called an assessment upon lands or a tax against individuals therefore, the legal effect of it is the same, for it creates a debt, payment of which may be enforced in the same manner as any other debt.** Nor is it material that the ordinance directing the assessment was not couched in the precise language used in the charter. The substance of it was the providing for an assessment to defray the expense of the improvement recited in it. The duty of making

* Laws 1861, 832, § 195; id., 1865, 1092, § 16; id., 1870, 1726, § 8.

† §§ 203, 130.

‡ 209.

‡‡ §§ 204, 205.

§ 1727, § 10.

¶ *People v. Mayor, etc., of Brooklyn*, 4 Com., 419.

** See *Mayor v. Colgate*, 2 Ker., 140; *Litchfield v. McComber*, 42 Barb., 238.

the assessment devolved upon the assessors; and the manner in which that duty should be performed, and the legal effect of their act upon land and individuals were fixed by the statute, and were not at all affected by the ordinance.

No lack of conformity to the charter, in any other respect than that on which the referee placed his decision, has been suggested. Jurisdiction having been duly acquired, we think the alleged defect in the ordinance was, at most, a mere irregularity. No mere formal defect or irregularity can affect the proceeding.*

The judgment must be reversed, and a new trial granted, with costs to abide the event.

Judgment reversed, and a new trial granted, costs to abide the event.



CAROLINE A. CUSHMAN, AND OTHERS, APPELLANTS, v.
DAVID M. HORTON, EXECUTOR, AND OTHERS, RESPONDENTS.

Word "heirs" in will — the distinction between the meaning of, in devises and bequests.

When land is devised to a person and his heirs, or to the heirs of a person named, the word "heirs" must be construed to embrace those only who are heirs in the strict, legal sense of the term; unless there is something in the will to show that it was used in a contrary sense.

In a bequest of personal property, the word "heirs" may be construed to mean children, or next of kin.

ON the 2d of February, 1865, Hiram Frisbie, of the town of Sennet, in Cayuga county, made his last will, and, by it, made the following bequests, viz.: Fourth. I give and bequeath to my sister, Polly Carter, the use and profits of \$2,000, to be paid her by my executor, hereinafter named.

Fifth. After the death of my said sister, Polly Carter, I give and bequeath said \$2,000, hereinbefore devised to my sister, Polly Carter, to the lawful heirs of my brother, Medad Frisbie, in equal proportions.

Seventh. I give and bequeath to my said wife, Charlotte H. Frisbie, all the rest, residue and remainder of my estate, of every description, for her own use and disposal.

* Charter, § 208.

The testator died in May, 1865, and his will was duly admitted to probate, and letters testamentary were duly issued to the executor named in his said will. At some time prior to the 27th May, 1873, Polly Carter died, and, on that day, a final accounting was had by her executor, of his accounts.

Medad H. Frisbie, the brother of the testator, appeared before the said surrogate, on such accounting, as did the guardian of Hiram F. Horton, together with Caroline A. Cushman and Emilissa Kellogg, grandchildren of Medad H. Frisbie, and demanded the payment to them, of the \$2,000 bequeathed to the heirs of said Medad. The widow of the testator also appeared, and demanded the payment to her of said \$2,000, on the ground that the said legacy had lapsed, there being no one entitled to take it at the death of Polly Carter, as a living man could not have heirs.

The surrogate held and decided that the legacy had lapsed, for the reason alleged, and directed the executor to pay said sum of \$2,000 to the widow, and from this decree, the grandchildren of said Medad appeal to this court.

Pratt, Mitchell & Brown, for the appellants.

H. V. Howland, for the respondents.

MULLIN, P. J.:

When land is devised to a person and his heirs, or to the heirs of a person named, the word "heirs" must be construed to embrace those only who are heirs in the strict, legal sense of the term, unless there is something on the face of the will, to show that the word was used by the testator in a more general and enlarged sense.*

But when the bequest is of personal property, then the word "heirs" may be construed to mean children, or next of kin.†

The word "heir" was used by the testator, in this case, in the sense of "next of kin," and the decision of the surrogate must be revoked, and the proceedings remitted, with instructions to enter

* *Heard v. Horton*, 1 Den., 165.

† 2d Redfield on Wills, 885 to 891; *Wright v. The Trustees of the Methodist Episcopal Church*, 1 Hoffman Ch. R., 202, and cases collated at 212, etc.

an order that the executor pay to the appellants the amount of the legacy given by the will to Polly Carter, with costs to the appellant, to be paid out of the estate of testator.

Ordered accordingly.

DENNIS KENNEDY AND OTHERS, APPELLANTS, v. WILLIAM
M. SIMMONS, RESPONDENT.

County judge — power of, to grant order of arrest.

An order of arrest may be granted by a county judge, though the action in which it is granted is not triable in his county, and though the attorney for the moving party does not reside therein.

APPEAL from an order made at a Special Term held in Onondaga county, setting aside an order of arrest made by the county judge of Cortland county. The facts are stated in the opinion.

Fuller & Vann, for the appellants.

Benton & Champlin, for the respondent.

E. DARWIN SMITH, J.:

It appears from a stipulation made by the attorneys for the purpose of this appeal, and from the opinion of the learned judge at Special Term, that the order of arrest was set aside upon the sole ground that the place of trial of said action being in the county of Onondaga, and the plaintiffs' attorney also residing in that county, the county judge of the county of Cortland had no jurisdiction or authority to grant such order of arrest, conceding that such order was made upon affidavits duly presented to such judge, containing sufficient grounds therefor, upon the merits.

The order at Special Term was doubtless based upon the construction of subdivision number 3, of section 401, of the Code, which provides that "orders made out of court, without notice, may be made by any judge of the court, in any part of the State, and they may also be made by a judge of the county where the action

is triable, or by the county judge of the county in which the attorney for the moving party resides."

This provision, we think, is an enlargement of the powers of the county judge, and applies to the general and ordinary class of orders made in the progress of a cause, and was not intended to qualify or restrict the express powers conferred upon county judges in respect to provisional remedies.

The power to grant injunctions, orders of arrest and attachments, is conferred upon the county judges in as clear and explicit language as upon the judges of this court, and is equally unqualified, in sections 218, 220, 223 and 225, in respect to injunctions, and 228, in respect to attachments, and 180, in respect to orders of arrest.

This construction of the powers conferred upon the county judges, in respect to provisional remedies, was in principle asserted and adopted by the Commissioners of Appeals, in the case of *Webb v. Bailey*, reported in the abstract of the decisions of that court, published in the Albany Law Journal, vol. 9, No. 17, at page 276, of the date of April 25, 1874. That was a case where, under like circumstances as in this case, an attachment was granted by the county judge of Chautauqua, in an action where the venue was in Cattaraugus, and the plaintiffs' attorney also resided in the last mentioned county. It was expressly held in that case, that the powers given to a county judge, to issue writs of attachment in actions in this court, by section 228, of the Code, are not restricted to cases to be tried in his county.

That case we consider decisive of the question presented upon this appeal, and the order of the Special Term must therefore be reversed.

Order reversed.

MEMORANDA

OF

CASES NOT REPORTED IN FULL.

ERASTUS A. CARROLL AND ANOTHER, RESPONDENTS, v. MARTIN WEILER, APPELLANT.

Liability of owner of dog, for injuries to sheep—evidence.

Action to recover for damages sustained by the killing and wounding of plaintiff's sheep by a dog of defendant. At the trial, it appeared that two dogs were engaged in killing and wounding the sheep, one of which was owned by a Mr. McCarthy, the other, as it was alleged, belonging to the defendant. Upon the defendant's cross examination, he was asked whether he had killed the dog since the former trial of the cause; *held*, that the question was proper; that in the absence of evidence as to the cause of killing, it might be inferred that the dog was killed to destroy proof of his identity, or that defendant believed that he had killed the sheep, and killed him to prevent further loss.

At the trial, McCarthy was allowed to testify that he, at one time, saw a dog resembling the defendant's, in his (McCarthy's) orchard, in company with his own dog. *Held*, that the evidence was properly admitted, as it tended to show that the dogs were known to each other, and, on one occasion, at least, were in company, thereby laying the basis for a presumption, that when a feast was to be had upon plaintiff's sheep, they would enjoy it together.

APPEAL from a judgment of the County Court of Ontario county, affirming a judgment of a justice of the peace in favor of the plaintiff.

J. Horr, for the appellant.

Edwin Hicks, for the respondent.

Opinion by MULLIN, P. J.

Judgment affirmed.

THOMAS E. PATTISON, PLAINTIFF, v. THE SYRACUSE
NATIONAL BANK, DEFENDANT.

Bank — Packages received for safe-keeping — when responsible for — when entitled to compensation for.

This action was brought to recover for the loss of certain securities deposited with the defendant. The defense was, that the bank had refused to receive packages for safe-keeping, for some time before the package in question was left, and that no compensation had been paid or agreed to be paid for keeping the package, and hence the bank was only liable for gross negligence. At the trial, it appeared that the bank had formerly been in the habit of receiving packages for safe-keeping, and that such business was not wholly discontinued at the time of receiving the plaintiff's package. *Held* (1), that, as no instructions were given to the subordinate officers of the bank to reject packages, and as no notice had been given that they would not be received, the receipt of such officers would bind the bank; (2), that, as the bank had been in the habit of taking money packages for safe-keeping, and as it did not appear that they were kept without charge, and unless they were so kept, the bank had the right to demand pay for the service, in which case the bailment would not be a gratuitous one, the case should have been submitted to the jury, and that the court erred in directing a nonsuit.

MOTION to set aside a nonsuit, and for a new trial, upon exceptions ordered to be heard in the first instance at the General Term.

George F. Comstock, for the plaintiff.

D. Pratt, for the defendant.

Opinion by MULLIN P. J.

New trial ordered, with cost to abide the event.

ISAAC WAID, RESPONDENT, v. LEWIS GAYLORD, SHERIFF,
IMPLEADED, ETC., APPELLANT.

Levy—when sufficient to sustain an action of replevin.

A levy upon the right, title and interest of the judgment debtor in goods, is, in law, equivalent to a levy upon the things themselves. It amounts to a seizure of the goods for the purpose of selling the whole or a qualified interest therein, and is sufficient to sustain an action of replevin.*

A judgment having been recovered against Thomas Waid, a son of the plaintiff, execution was issued thereon, and placed in the hands of defendant. M., one of his deputies, went to the house of the plaintiff, in his absence, and levied upon all the right, title and interest of the said Thomas, in certain property, and subsequently advertised the same for sale. Thomas had no right or interest, whatever, in the property. In an action of replevin, brought by the plaintiff, *held*, that he was entitled to recover.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

Southworth & Parks, for the appellant.

K. Carroll, for the respondent.

Opinion by GILBERT, J.

Judgment affirmed.

GEORGE F. DE ROE, RESPONDENT, v. ROSWELL B. SMITH,
AS PRESIDENT OF ROCHESTER TOWING COMPANY, JOHN BIRD
AND ROSWELL B. SMITH, APPELLANTS.

Usury—joint stock associations—when precluded from setting up, as a defense.

THIS action was brought on a promissory note, made by the Rochester Towing Company, a joint stock association, organized under the laws of this State, and indorsed by the other defendants. On the trial, the defendants offered to prove facts, showing that the note was usurious. The evidence was excluded under chapter

* *Knapp v. Smith*, 27 N. Y., 277; *Latimer v. Wheeler*, 1 Keyes, 468.

172 of the Laws of 1850, which provides that joint stock associations, having any of the powers or privileges of corporations, not possessed by individuals or partnerships, are prohibited from interposing the defense of usury in any action. The court were of opinion that this company had such powers and privileges;* that the individual defendants, being mere accommodation indorsers, could not avail themselves of the defense of usury.†

Lewis H. Babcock, for the appellants.

C. D. Adams, for the respondent.

Opinion by GILBERT, J.

Judgment affirmed.

CHARLES H. MOORE, ADMINISTRATOR, ETC., RESPONDENT, v.
ALBERT H. PICKARD, APPELLANT.

Conditional sale — Machine to be tried.

The plaintiff's intestate sold and delivered to the defendant a Buckeye reaper and mower, and it was agreed, that if the machine did not work well, the defendant need not keep or pay for it. The machine did not work as a reaper, but was a good mower. The defendant used the machine during the season of 1868, and had it repaired by plaintiff's intestate in the spring of 1869, upon the agreement that, if the machine did not work well, the defendant need not keep it. Defendant used the machine during the season of 1869, and nearly wore out the mowing part, which worked well after it was repaired in 1869. In an action brought by the plaintiff, the referee directed judgment in his favor, for the value of the machine as a mower. *Held*, that the defendant was only entitled to try the machine for a reasonable time, but that such reasonable time was exceeded by the defendant, and that he was clearly liable for the mower; and that the referee might have presumed, from his retention of the machine for so long a time, that he had accepted the whole machine.

* 3 R. St., Edmonds' ed., 684, 685; 4 id., 650, *et seq.*; 7 id., 55, 82, 306, 426; Robbins v. Wells, 18 Abb., 191; Waterbury v. Merch. U. Ex. Co., 3 id., N. S., 163.

† Rosa v. Butterfield, 33 N. Y., 665; Belmont Branch of State Bank v. Hodge 35 id., 65.

APPEAL from a judgment in favor of plaintiff, entered on the report of a referee.

Thomas M. Webster, for the appellant.

E. Porter, for the respondent.

Opinion by SMITH, J.

Present—MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment affirmed.

AUGUSTE DU FORT, RESPONDENT, v. BRIDGET CONROY,
APPELLANT.

Real estate—title to, acquired by possession.

The referee having found as matter of fact in an ejectment suit, that, for more than forty years, the lots of the respective parties had been separated by a partition fence; that the lots had been used and cultivated by their respective owners, for more than thirty years, up to the fence, on each side; that in 1869 plaintiff's agent moved the fence two feet on to the lot occupied by defendant; that in August, 1871, defendant removed the fence to where it stood before, and brought an action and recovered damages against plaintiff for removing the fence; *held*, that it was error to find as conclusion of law, that the plaintiff was owner of the strip of land between the fence, as it originally stood, and as it stood after its removal by plaintiff.

APPEAL from a judgment, entered upon the report of a referee in favor of the plaintiff.

B. Bagley, for the appellant.

D. O'Brien, for the respondent.

Opinion by SMITH, J.

Present—SMITH and GILBERT, JJ.

Judgment reversed and a new trial granted before a new referee.

PHILENA B. FISHER, AS ADMINISTRATRIX, ETC., AND OTHERS,
PLAINTIFFS, v. GEORGE HUBBELL, AS EXECUTOR, ETC., AND
OTHERS, RESPONDENTS.

Reference—order of—when unusual.

A decree giving a construction to a will and appointing a referee, and also making him a receiver, with power to carry his decision into effect without previously making his report to the court for confirmation, in an action brought for the construction of a will, for an accounting, sale of real property, and for other relief, goes further than is usual, and should be modified by making the reference to the referee merely interlocutory, with direction to report to the court upon all the facts, matters, etc.*

MOTION for a new trial under section 268 of the Code.

De L. Crittenden, for the plaintiff, Caroline C. Frary.

W. W. Rowley, for the plaintiff, Philena B. Fisher.

Morse & Wells, for the defendants.

Opinion by SMITH, J.

Present—MULLIN, P. J., SMITH and GILBERT, JJ.

Decree modified.

JOHN W. COLLINS, PLAINTIFF IN ERROR, v. THE PEOPLE,
ETC., DEFENDANTS IN ERROR.

*Bigamy—Trial—place of—cannot be had in county where offense was not committed
nor prisoner apprehended—3 Rev. Stat. [5 ed.], 968, § 10.*

The plaintiff in error was indicted, tried and convicted of bigamy, in the Court of Sessions of Oswego county. The proof showed that the second marriage took place in Yates county, and that the prisoner was apprehended there; and the prisoner's counsel moved that the prisoner be discharged, as the offense was not committed nor the prisoner apprehended in Oswego county. *Held*, that the court erred in refusing to discharge the prisoner; the statute providing that, for a second or

*The construction given to the will by the decree, was that suggested in the opinion delivered in this case on a former hearing at General Term. (1 N. Y. Sup. Ct. Rep., 97.)

other marriage, the person committing such offense may be tried in any county in which such person may be apprehended. (3 R. S. [5 ed.], 968, § 10.)

WRIT of error to the Court of General Sessions of the Peace, in and for the county of Oswego.

William Tiffany and W. G. Robinson, for the plaintiff in error.

J. J. Lamoree, District Attorney, for the defendants in error.

Opinion by SMITH, J.

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

Conviction reversed and prisoner discharged.

DAVID H. SCHOONMAKER, AND THOMAS REED,
RESPONDENTS, v. SIMEON ROUSE, APPELLANT.

Measure of damages.

Plaintiff agreed in writing to purchase from defendant 200 tons of ice. He ordered and received and paid for two loads, and then gave defendant notice that the ice was not good and merchantable, and that he would not take the residue. Plaintiff kept the ice for defendant till it was worthless. The referee found that the ice was merchantable, and that plaintiff was entitled to recover for the ice not paid for, following, as to the measure of damages, *Dustan v. McAndrew et al* (44 N. Y., 73).

APPEAL from a judgment, entered on the report of a referee, in favor of the plaintiff.

Sedgwick, Kennedy & Tracy, for the appellants.

Wood & Rathbun, for the respondents.

Opinion of SMITH, J.

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment affirmed.

ROBERT E. HILL, RESPONDENT, v. JOHN W. NORTHRUP,
FLAVILLA NORTHRUP, IMPLEADED, ETC., APPELLANTS.

Promissory note—given to compromise felony—Bona fide owner—Evidence—order of reception of.

In an action upon a promissory note, the defense was set up, that it was given to compromise a felony. The court refused to allow the defendant to show this fact, unless he first showed that the plaintiff was not a *bona fide* owner of the note. *Held*, that this was not an error—that the court had a right to determine the order in which evidence should be introduced—and that, as the facts which the defendant offered to show would not constitute a defense unless the plaintiff was shown not to be a *bona fide* purchaser, it was proper that the latter fact should be first shown.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

H. C. Miner, for the appellants.

Fuller, Vann & Brooks, for the respondent.

Opinion by SMITH, J.

Present—MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment affirmed.

HENRY M. CLARK, APPELLANT, v. ISAAC HAMPTON,
RESPONDENT.

Promissory note—Guaranty—when void for want of consideration expressed in it—in action on, insolvency of maker of note may be shown.

A guaranty, written upon a promissory note in the words, "I hereby guarantee that the above note is not outlawed, according to the laws of the State. [Signed] Isaac Hampton," is invalid, no consideration being expressed in it. In an action thereon, it is proper to show, on the question of damages, that the maker of the note is insolvent, and that a judgment against him cannot be collected.

Bridge v. Mason (45 Barb., 88) followed.

FOURTH DEPARTMENT, JUNE TERM, 1874.

APPEAL from a judgment of the Livingston County Court, reversing a judgment for the plaintiff in the justice's court.

L. B. Proctor, for the appellant.

C. J. Bissell, for the respondent.

Opinion by SMITH, J.

Present—MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment of the county court affirmed.

JOHN M. JONES, RESPONDENT, v. THOMAS CHANTRY,
APPELLANT.

A party who directs an obstruction to be put in a highway, cannot shield himself from liability, by showing that it was put there by a contractor.

APPEAL from a judgment, entered on the verdict of a jury, in an action brought to recover for damages sustained by plaintiff, he being thrown from a wagon while driving on a public highway, by reason of obstructions placed there by defendant's contractor, under defendant's direction.

J. Thomas Spriggs, for the appellant.

W. Kernan, for the respondent.

Opinion by GILBERT, J.

Judgment affirmed.

MARY A. KITTELL AND OTHERS, APPELLANTS, v. WILLIAM
R. OSBORN AND OTHERS, RESPONDENTS.

Assignment for benefit of creditors — construction of — passies trust.

An assignment of property in trust for its sale and the payment of the assignor's debts, and for the investment of the residue, if any, for the assignor's use during his life, and, in case of his decease before the completion of said trust, and the payment of his debts, that the residue be passed over to his heirs-at-law, gives

the assignor's heirs no estate, unless he dies before his debts are paid. No trust is thereby created in the surplus after payment of debts, as a mere passive trust to hold property for another's use cannot exist under the laws of this State.

APPEAL from a judgment, entered on the report of a referee, in favor of the defendant.

John B. Murray, for the appellants.

E. H. Lamb, for the respondents.

Opinion by GILBERT, J.

Judgment affirmed.

JOSEPH M. RAY, APPELLANT, v. SALMON B. ROWLEY AND
OTHERS, RESPONDENTS.

Jurisdiction — of parties — when presumed from recovery of judgment — Judgment — when cannot be attacked collaterally.

In an action to set aside a conveyance, as fraudulent as against defendants' creditors, the plaintiff offered in evidence, a judgment roll in an action in which he had recovered a money judgment against the defendant. This was objected to and excluded, on the ground that the papers did not show that the summons was served on the defendant in such action. *Held*, that this was error; that where a judgment is recovered in the Supreme Court, jurisdiction is presumed, and no proof of it is necessary. If irregular, the judgment cannot be attacked collaterally when offered in evidence in another suit.

APPEAL from a judgment dismissing plaintiff's complaint.

D. Millar, for the appellant.

George C. Greene, for the respondents.

Opinion by GILBERT, J.

Judgment reversed, and a new trial granted, with costs to abide the event.

HIRAM BOYER, APPELLANT, v. BOSWELL D. BROWN,
RESPONDENT.

New trial — case on appeal from order granting — what should contain.

When a new trial is granted upon the judge's minutes, it must be considered as granted upon all the proceedings of the trial, including all the testimony and the charge of the judge; and when the case on appeal does not profess to contain the whole evidence, and gives only a portion of the judge's charge, the appellate court cannot say that the granting of a new trial was error.

APPEAL from an order of the County Court of Herkimer county, granting new trial.

Link & Dennison, for the appellant.

Burrows & Palmer, for the respondent.

Opinion by SMITH, J.

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment affirmed.

WILLIAM B. NICKELSON, APPELLANT, v. GEORGE A.
WILSON, AND JOHN L. BAKER, AS ASSIGNEE IN BANKRUPTCY
OF SAID WILSON, RESPONDENTS.

Contract — when void as against public policy.

APPEAL from a judgment dismissing plaintiff's complaint, in an action brought for the specific performance of a contract, claimed by defendant to be void, as being against public policy. In 1868, the plaintiff owned a patent for a cheese box, which he sold to the defendant Wilson and one Scott, for \$12,000, each agreeing to pay one-half of said price. Wilson claiming that plaintiff and Scott conspired together to cheat and defraud him, by representing that the price of said patent was \$12,000, when in truth and fact it was worth but \$6,000, procured them to be indicted for the fraud, and brought an action against said plaintiff and Scott, to recover the

amount of said notes, upon the ground, as it was claimed, that said notes had been transferred to *bona fide* holders.

Scott filed a petition in bankruptcy against said Wilson, to have him declared a bankrupt, and his property transferred to an assignee.

The counsel for said Wilson doubting whether Scott could be convicted, or the civil action maintained, without the testimony of the plaintiff, a negotiation was entered into between the counsel for said plaintiff in these actions, and the counsel for said Wilson, which resulted in an agreement, of which the following is the abstract or outline, viz. :

1. Nickelson will testify to all he knows in bankrupt case, in civil case, and in the criminal case.

2. If there be no recovery against Scott in the civil action, there shall be none against N.

3. The civil case going to judgment shall not be enforced against N. for more than \$1,000, and this sum may be paid in one of Wilson's notes for that sum.

4. Nickelson shall be given the control for his benefit, of judgment against Scott, for whatever sum he has to account for to Wilson.

N. testifying fully as above, the counsel will recommend a *vol. pros.* against N.

The court found, as matter of law, that the agreement made between the attorney of the plaintiff and of the defendant Wilson, was against public policy and void, and ordered judgment dismissing plaintiff's complaint, with costs, and from that judgment the plaintiff appealed to the General Term, where the court held, that "there was a very powerful inducement presented to Wilson to soften down his evidence against plaintiff, if not to altogether suppress it, and a contract which induces such conduct on the part of a prosecutor in a criminal proceeding, is unlawful and void."

C. D. Adams, for the appellant.

Watson M. Rogers, for the respondents.

Opinion by MULLIN, P. J.

Judgment affirmed, with costs.

WILLIAM D. PETRIE, RESPONDENT, v. FREDERICK H.
DORWIN, APPELLANT.

Sale — Statute of frauds — Delivery.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was for the conversion of a horse, double harness and a plow, sold by the defendant to the plaintiff. The sale was denied by the defendant. The referee found in favor of the plaintiff, and the General Term refused to disturb his findings. The defendant insisted that the sale was void within the statute of frauds; but the court held that although the agreement was not in writing, and nothing was paid, yet, as the referee found that the property had been delivered to the defendant, and as he had used it for some two years, the sale was perfected by such delivery, though not made until after the time of entering into the verbal agreement.*

L. J. Dorwin, for the appellant.

Wynn & Porter, for the respondent.

Opinion by MULLIN, P. J.

Judgment affirmed.

NORMAN MALCOLM, RESPONDENT, v. WILLIAM T. FAGAN,
IMPLEADED, ETC., APPELLANT.

Answer — Evidence of matter not set up in, rejected.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was brought upon a promissory note, indorsed by the defendant. At the trial, the defendant offered to prove that the note was made for the accommodation of one Phelps, and that it

* Sprague v. Blake, 20 Wend., 61; McKnight v. Dunlop, 1 Seld., 537.

was delivered to the plaintiff, not to be used, but to be held by him as security for advances made in buying in the property of Phelps at a sheriff's sale, and that it was diverted from the purpose for which it was made. The court held that the evidence was properly rejected, as no such defense was set up in the answer.

Francois Kernan, for the appellant.

W. Ballou, for the respondent.

Opinion by MULLIN, P. J.

Judgment affirmed.

WILLIAM H. WATSON, APPELLANT, v. ERASTUS W.
PARKER, RESPONDENT.

Statute of frauds — Agreement to answer for the debt of another.

APPEAL from a judgment, entered on the report of a referee, in favor of defendant. The referee found that it was "agreed between plaintiff and defendant, that whatever grapes the defendant should sell and deliver to said Hood, in pursuance of any agreement between them, should apply on the plaintiff's then account against the defendant, and also upon what he, the defendant, and his men should thereafter trade with the plaintiff on defendant's account, to the extent of the account." The court was of opinion that the evidence did not sustain this finding, and that if so, it was within the statute of frauds, within the principle laid down in *Mullory v. Gillett* (21 N. Y., 415).

D. B. Prosser, for the appellant.

Brown & Wood, for the respondent.

Opinion by GILBERT, J.

Judgment reversed and new trial granted, with costs to abide the event.

STEPHEN REMINGTON AND JACOB GERLING, PLAINTIFFS,
v. OLIVER H. PALMER, DEFENDANT.

Agent — authority of.

EXCEPTIONS ordered to be heard, in first instance, at General Term.

Defendant conveyed to plaintiff's son, real estate by deed, without personal covenants on his part. Plaintiffs complained to defendant's agent that there was an unpaid assessment charged on the lot. Defendant being informed of it, wrote to his agent to pay it in his discretion. The agent declined to pay it, saying it was not due; that the defendant would pay it when due. In this action, brought by the purchasers against the vendor, the court were of the opinion that the authority given the agent to pay the assessment, did not authorize him to bind the defendant by a promise of future payment.

J. C. Cochran, for the plaintiffs.

W. F. Cogswell, for the defendant.

Opinion by GILBERT, J.

Judgment ordered for defendant on the verdict.

BETSEY A. FERGUSON AND HELENA H. BORDEN,
ADMINISTRATRIXES, ETC., Respondents, v. MARY MORRIS
AND JOHN MORRIS, Appellants.

APPEAL from a judgment entered on the report of a referee in favor of the plaintiff. The action was brought for the foreclosure of a mortgage. The court, after an examination of the evidence, was of opinion that there was no consideration for the mortgage, and that the judgment was erroneous.

Risley & Stoddard, for the appellants.

Richardson & Adams, for the respondents.

Opinion by MULLIN, P. J.

Judgment reversed, and new trial granted before another referee, costs to abide event.

LEVI B. MILLER, Appellant, v. PETER PERRINE AND
ADOLPHUS PERRINE, Respondents.

Notice of appeal—service of, on one partner sufficient.

APPEAL from an order of the Herkimer County Court, dismissing the appeal.

A motion was made in the County Court of Herkimer county, to dismiss the appeal from the justice's court in this case, on the ground that notice of appeal had been served on Peter Perrine only, and not on Adolphus Perrine. The respondents were partners. The court were of opinion that notice to one partner was notice to both.

Link & Dennison, for the appellant.

Burrows & Palmer, for the respondents.

Opinion by GILBERT, J.

Order reversed, with costs.

SANFORD M. HUNT, RESPONDENT, v. JEREMIAH
MITCHELL AND CHARLES BAILEY, APPELLANTS.

Promissory note—alteration of—when immaterial.

APPEAL from a judgment entered on the verdict of a jury, and from an order denying motion for a new trial.

In this case the court were of opinion that an alteration in a promissory note, which it was claimed invalidated it, was not a material one, but, that if it were, an admission in the answer that the defendants accepted the altered note, put the fact of the alteration out of the issue. That upon the merits there was a conflict of evidence and no sufficient reason to set aside the verdict.

Burrows & Palmer, for the appellants.

Link & Dennison, for the respondent.

Opinion by GILBERT, J.

Judgment and order denying new trial affirmed.

WILLIAM A. YORKS, RESPONDENT, v. HOWELL MOSHER,
APPELLANT.

"THIS case presents and depends upon a single question of fact." "The question was for the referee on the facts, and his finding cannot, I think, be disturbed."

H. L. Comstock, for the appellant.

E. A. Nash, for the respondent.

Opinion by SMITH, J.

Present—MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment affirmed.

**JAMES WARD, RESPONDENT, v. PHILANDER A. SPENCER
AND ANOTHER, IMPEADED, ETC., APPELLANTS.**

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

The General Term held that the case had been properly submitted to the jury, and that, as there was sufficient evidence in the case to support their verdict, the judgment should be affirmed.

A. E. Kilby, for the appellants.

F. W. Hubbard, for the respondent.

Opinion by MULLIN, P. J.

Judgment affirmed.

**WILLIAM H. PETTIS, APPELLANT, v. DELOS D. PIER
AND ANOTHER, RESPONDENTS.**

APPEAL from a judgment in favor of the defendants, entered upon the verdict of a jury, and from an order denying a motion for a new trial, made upon the judge's minutes.

The opinion delivered at the General Term was entirely devoted to an examination of the facts of the case, and the judgment was reversed, for the reason that the judge at the circuit had submitted to the jury certain questions of fact; such submission being unauthorized by the evidence given at the trial.

Ball & Searle, for the appellant.

Bagg & Collins, for the respondents.

Opinion by MULLIN, P. J.

Judgment reversed and new trial ordered, costs to abide the event.

ALLEN WHITE, RESPONDENT, v. CHARLES S. TURNER,
ADMINISTRATOR, ETC., AND OTHERS, APPELLANTS.

APPEAL from a judgment entered on the report of a referee in favor of the plaintiff.

In this action, brought to foreclose a mortgage, the defense of usury was set up in the answer. The referee found that the mortgage was a valid instrument, and was given to secure a portion of the purchase-price of land sold to the mortgagor. The court held that this finding was conclusive, and affirmed the judgment.

Julius A. Parsons, for the appellants.

D. Sherman, for the respondent.

Opinion by SMITH, J.

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment affirmed.

IN THE MATTER OF THE APPLICATION AGAINST JOHN J.
LAMOREE.

THE consideration of this case related entirely to a question of fact, and the court was of opinion that the allegations in the moving papers, rested more upon the suspicions of the parties making them, than upon satisfactory evidence, and were completely refuted by the evidence submitted by Mr. Lamoree.

Opinion by GILBERT, J.

Motion denied.

Cases
DETERMINED IN THE
FIRST DEPARTMENT
AT
GENERAL TERM,
July, 1874.

**CHARLES E. BERRIAN, RESPONDENT, v. JOSEPHINE E.
SANFORD, APPELLANT.**

*Parol evidence of contents of memorandum — Referee — right to reserve decision, as to
admission or rejection of evidence.*

The plaintiff and defendant entered into an agreement for the exchange of certain property, whereby the defendant was, among other things, to deliver seven horses to the plaintiff. One of the horses having died, before its delivery, it was agreed that the defendant should deliver another horse; or, in case of her failure so to do, that she should pay the plaintiff \$300, though the latter alternative was denied by the defendant. This action was brought upon the second agreement.

Upon the trial, the plaintiff testified, that, before entering into the contract of exchange, a memorandum was made of the defendant's property, each item thereof being valued, which memorandum was the basis of the exchange. He then testified, against the defendant's objection and exception, that the horse which died, was set down therein at \$300. *Held*, that this was error; that the memorandum was the best evidence of its own contents, and that it should have been produced or accounted for.

Where a referee receives evidence objected to, reserving the question of its admissibility, he ought, before closing the case, to make his final ruling, receiving or rejecting the evidence, and advise the parties, so that proper exception may be taken. Failing to do this, the court, on motion, might open the case and send back the report, or, on appeal, treat the action of the referee as error, when

the evidence was so far material that it may have had some influence on his findings.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The referee found that the parties to this action, entered into a written agreement for the exchange of certain property, whereby the defendant agreed, among other things, to deliver to the plaintiff seven horses. Prior to their delivery, one of them died. The defendant thereupon entered into another agreement with the plaintiff, to deliver to him another horse, of equal value, in place of the one that died, or to pay him \$300. The defendant denied that any sum had ever been agreed upon to be paid in case the horse was not delivered, and alleged that another horse had been delivered to, and accepted by the plaintiff in lieu of the one that died. Other facts appear in the opinion.

Whitehead H. Van Wyck, for the appellant.

Hatch & Beneville, for the respondent.

DAVIS, P. J.:

There were several errors committed by the referee upon the trial, some of which are fatal to the recovery.

The plaintiff testified that the parties, before making the contract of exchange which was put in evidence, made a memorandum of the defendant's property, and a valuation of the several items, which was the basis of the subsequent trade. He was allowed, against defendant's objection and exception, to testify that in this memorandum, the horse which subsequently died, was set down at \$300. This evidence, although collateral, was material. The action was upon an alleged agreement to deliver any equally valuable horse or pay \$300, and, of course, the fact that the parties had, before the trade, mutually appraised the horse at that sum, as a basis of the contract, was material upon the disputed question whether defendant, after the death of the horse, had agreed to deliver another or pay \$300. The memorandum of the parties was the best evidence of its own contents. The defendant testified that no such memorandum was made. It should have been produced or accounted for. The objection to oral evidence of its contents was well taken, and should have been sustained.

The practice of referees in receiving testimony objected to, and reserving the question of its admissibility, without passing upon the objection, was commented upon and disapproved in *Sharpe v. Freeman*,* and condemned in *Clussman v. Merkel*.† The reservation itself is probably not error, but the referee ought, before closing the case, to make his final ruling, receiving or rejecting the evidence and advise the parties, so that proper exception may be taken. Failing to do this, the court, on motion, might with propriety open the case and send back the report, so that the ruling may be made and due exception taken; or, on appeal, treat the action of the referee as error, where the evidence given is so far material that it may have had some influence on the findings and conclusion of the referee.

In this case, however, the evidence taken under the reserved decision, was not so material to any disputed question, that this court would reverse the judgment on that ground.

It was error to exclude the questions put to Sanford. The plaintiff had testified that Sanford had said to him that the horse had died, and that they would give him another horse worth \$300, or \$300 in money. On redirect examination, Sanford was asked whether anything was said to plaintiff about paying any money for the horse that died, and whether plaintiff said anything to him about receiving \$300 for the dead horse. These questions were ruled out, and defendant excepted. There was no ground for their exclusion.

It was error, also, to exclude the question to the witness Skidmore. This witness was recalled, and stated that "he recollected more vividly," matters as to which he had given testimony. He was asked, "From what facts you now remember, can you state positively whether Berrian accepted that horse or not?" This question was objected to and excluded, and defendant excepted. No special ground of objection was assigned, and it appears to have been ruled out for general incompetency. We think the ruling was not correct.

We are not disposed to pass upon the question whether the findings of the referee were not against evidence. The witnesses were before him, and his opportunities to judge of their credibility were

* 45 N. Y., 802.

† 3 Bos., 402.

such as the printed papers do not afford to us. There must be a new trial, with costs to abide event.

DANIELS and BRADY, JJ., concurred.

New trial ordered, with costs to abide the event.

JAMES L. HARWAY, RESPONDENT, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, APPELLANTS.

Set-off—of cause of action arising from tort—how may be pleaded—Assignee of cause of action.

An action of assumpsit lies for money obtained by oppression, imposition, extortion or deceit; and the demand for the money so obtained, may be set up as a set-off in an action brought by the party against whom it exists. The assignee of such party takes a cause of action subject to such defense of set-off. In setting off a cause of action, in form, in assumpsit, but arising from tort, it is proper to set forth the fraud and collusion upon which the cause of action depends.

APPEAL from an order of the Special Term, striking out portions of the answer alleging fraud and collusion, as irrelevant and redundant.

E. Delafield Smith, Corporation Counsel, and *James U. Carter*, for the appellants.

J. S. Lawrence, for the respondent.

DAVIS, P. J.:

The plaintiff in this action sues as assignee of one Berrian, to recover divers large accounts against the city, for goods, wares and merchandise, sold and delivered to the defendant by said Berrian. The accounts, and the indebtedness thereon, are not denied. The sole defense set up by the answer, is a set-off of an alleged indebtedness of Berrian to the defendant, for a larger amount than plaintiff claims. The indebtedness is alleged to be for large sums of money, paid by the defendant to Berrian, in amounts and at times specified, and obtained by means of fraudulent practices, pretenses and representations, by said Berrian, in collusion with, or by

deception of, the officers of defendant. The answer avers and sets out, concisely and without redundancy, the fraudulent means by which the money is alleged to have been obtained, and alleges that the same was received by Berrian, to and for the use of defendant. It is well-settled law, that "if one man has obtained money from another, through the medium of oppression, imposition, extortion or deceit, such money is, in contemplation of law, money received for the use of the injured party; it is not the money of the wrong-doer, and he has no right to retain it, and the law therefore implies a promise from him, to return it to the rightful owner, whose title to it cannot be destroyed and annulled by the fraudulent and unjust dispossession. The tort may be waived, and an action brought for the recovery of the money, upon the implied contract." *

The cases are very numerous which establish that an action of assumpsit, at common law, for moneys thus obtained, could have been brought upon the implied promise. The statute † declares what demands may be the subject of set-off, and specially names causes of action arising upon contract, *express or implied*; and wherever assumpsit will lie for money had and received, the demand therefor may be set off in an action of assumpsit, brought by the party against whom it exists; and the assignee of such party takes the cause of action, subject to the defense of set-off, to the same extent as it existed against the assignor. ‡

It is true, the defrauded party in such case has a choice of remedies. He may pursue the person, guilty of the fraud in an action of tort for damages sustained by the injury, or waiving that remedy, he may treat the matter as simple debt, and proceed upon the implied contract to repay the money. There is no doubt, therefore, that upon proofs of the facts alleged in the answer the

* Chambers v. Lewis, 2 Hilt., 591; Putnam v. Wise, 1 Hill, 285, 240, note; Neate v. Harding, 6 Exch., 849.

† 2 R. S., Edmonds' ed., p. 365, § 18.

‡ See statute above cited; Whitcomb v. Williams, 4 Pickering, 228; The Duke de Cadaval v. Collins, 4 A. & E., 858; Byxbie v. Wood, 24 N. Y., 607; Selwyn's N. P., 7 Amer. ed., 82, and notes; Chitty on Contracts, 10 Amer. ed., 704, *et seq.*; Walte v. Leggett, 8 Cow., 195; Clark v. Dutcher, 9 id., 674; Coit v. Stewart, 50 N. Y., 17; Andrews v. Artisans' Bank, 26 id., 298; Myers v. Davis, 22 id., 489; Martin v. Kunzmüller, 37 id., 396.

defendant will be entitled to enforce his defense of set-off in this action to the extent necessary to extinguish the demands held by the plaintiff as assignee of Berrian. The answer of defendant, it will be observed, proceeds altogether upon the right springing out of the alleged fraud. It claims nothing, except upon the ground that Berrian obtained the excessive payments, by fraudulent pretenses and practices. The allusion to the city officers who passed upon and paid the accounts, is not made for the purpose of averring mistake as a distinctive ground of claim, but to aver that those officers were deceived by, or in collusion with, Berrian's alleged frauds. It will be necessary therefore, on the trial of the action, to give evidence of and satisfactorily show the alleged frauds, in order to establish the basis of the implied promise to pay back the money had and received; and a jury must pass upon those questions. This fact does not, however, change the nature of the alleged defense, which is all the while a mere set-off of indebtedness, arising upon an implied contract. In all cases of implied contracts, the facts upon which the law implies the contract must be made to appear by proof or admission; and so, in this case, unless the plaintiff admits the alleged indebtedness, the defendant must proceed to prove it, which can only be done by proving the facts out of which the law implies it. Hence, it is no ground to exclude a set-off upon an implied contract, that, to maintain the implication requires evidence satisfactorily establishing a tortious or fraudulent transaction. In speaking of a party's right to assert his claim in such cases as a contract for the payment of money, the books speak of him as "waiving the tort." This phrase means no more than that by treating the matter as a contract, he waives his right to pursue it as a tort with the peculiar remedies, penalties and consequences belonging to it in that character.

He by no means waives the right to give evidence of the transaction, and of its true character, in order to raise the implication upon which his demand in contract must rest, for that would be to waive all remedy. The waiver of the tort, therefore, is simply a declaration that, for the purposes of redress, the party elects to treat the facts as establishing an implied contract which he may enforce, instead of an injury by fraud or wrong, for the committing of which he may demand damages, compensatory or exemplary.

In either case, the facts remain the same, and are alike the subject of proof, and the basis of the remedy, except as to such incidents as, in the action for tort, may bring in the elements of willful or malicious injury, to give scope for larger damages. Under the common law rules, it was sufficient to aver the indebtedness in the form of the well-known counts of *indebitatus assumpsit*; but it would also have been proper to plead by special declaration in *assumpsit*, alleging the fraudulent acts, and averring the indebtedness arising therefrom, and a promise to pay.

It is doubtful whether, under the Code, the former of these modes should be allowed, but it is not necessary to pass upon that question. The real question on this motion is, whether, where facts exist upon which the law implies a promise (in the absence of an express one), to repay money fraudulently obtained, it is irrelevant, in a pleading under the Code, to set up the facts which must be proved, and aver as the gravamen of action the liability and promise which the law implies from them. We are of opinion that it is not irrelevant, but more nearly conforms to the spirit and requirement of the Code, and is the wiser and safer course of pleading. It certainly is no detriment to the plaintiff, but rather to his advantage to have notice in advance of the precise facts he will be called upon to meet; and where the statement is made by complaint or answer in a concise form, without *redundancy* (which means vain repetition), and the facts stated are such as are essential to be proved on the trial, to constitute a defense or action, the opposite party cannot be said to be aggrieved thereby.*

We are of opinion that the order, striking out portions of the answer as irrelevant and redundant, is erroneous, and should be reversed, with costs of this appeal, and the motion denied, with costs.

DANIELS and BRADY, JJ., concurred.

Order reversed, with costs.

* Code, sec. 160, and see Wait's annotated Code, page 293, and the cases cited in notes.

NOTE.—The case of James W. Mills, an assignee of Daniel Berrian of a similar claim, was argued with the above cause. Rep.

JOSEPH C. WOODRUFF AND ANOTHER, RESPONDENTS, v.
JOHN LEONARD, APPELLANT.

*Promissory note — complaint in action against indorser — what must be alleged in —
Code, § 162 — Demurrer — when not frivolous.*

This action was upon a promissory note made by S. & M., payable to the order of the plaintiffs, and indorsed by the defendant. The complaint alleged that the plaintiffs were the owners of the note, and "that the defendant indorsed said note at the time of the making thereof." The note was set out in full, but a copy of the indorsement was not given. The defendant demurred. The plaintiffs moved for an order directing judgment for them, on the ground that the demurrer was frivolous, which was granted. *Held*, that this was error; that in order to entitle the plaintiffs to recover, it was necessary for them to allege the special circumstances charging the defendant as first indorser, to rebut the presumption that he was second indorser.

APPEAL from a judgment entered on an order made at Special Term, directing judgment for the plaintiffs on the ground that the demurrer interposed by the defendant, was frivolous.

The facts are stated in the opinion.

Geo. W. McAdam, for the appellant.

M. P. Stafford, for the respondents.

DAVIS, P. J. :

This action is brought against defendant, as indorser of a promissory note. The plaintiffs allege, "that on or about the 20th day of February, 1873, the plaintiffs, for a good and valuable consideration, became the owners of a certain negotiable promissory note, of the terms and tenor following, to wit :

" \$500.

" NEW YORK, *February 20th*, 1873.

" Six months after date, we promise to pay to the order of Woodruff & Houston, five hundred dollars, at Martin & Runyan's, 40 Wall street, with seven (7) per cent interest from date. Value received.

" SIMMONS & McPARTLIN."

That the defendant indorsed said note, at the time of the making thereof.

The complaint then avers presentation, protest and notice, and non-payment, and demands judgment for the amount of the note, with interest and costs. The defendant demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action against him. The court, on proper application at Chambers, ordered judgment for plaintiff, on the ground that the demurrer was frivolous, and judgment was thereupon entered, from which the defendant appeals. It seems to have been supposed that the complaint was good, under section 162 of the Code. That section provides, that in an action "founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and state that there is due to him thereon, from the adverse party, a specified sum which he claims." But the complaint is not framed under this section. The action is against the indorser only, and the instrument on which it is founded, is the contract of indorsement upon the note. The note is set forth, but no copy of the indorsement is given. In that respect, the complaint contains only the averment that the defendant indorsed the note, without setting out a copy of the indorsement, and therefore it fails to comply with section 162. But if it had set out a copy of the indorsement, *in hæc verba*, it would probably have been essential, since the plaintiffs are payees of the note, to allege the special circumstances charging the defendant as first indorser, to rebut the presumption that his relation to the paper, was that of second indorser.*

The case, therefore, presents the simple question, whether, upon the facts averred, the plaintiffs are not presumptively the first indorsers, and the defendant the second indorser, so that it is incumbent on the plaintiffs to aver the facts and circumstances, to overcome the legal presumption, and entitle them to sue the defendant as indorser.

In *Moore v. Cross*, † that was done, and, upon the facts averred and proved, the recovery was sustained. In *Bacon v. Burnham*, ‡ it was not done either by averment or proof, and the recovery was reversed.

* See *Conkling v. Gandall*, 1 Keyes, 228. † 19 N. Y., 227. ‡ 37 N. Y., 614.

FIRST DEPARTMENT, JULY TERM, 1874.

In the last named case, BACON, J., said: "The note is made payable to Sweezy, or his order; and being indorsed by the defendant, the legal presumption from this simple fact (nothing appearing to show that he intended to assume any other character), is, that his responsibility was that of second indorser, with all the rights, and subject only to the liabilities of that position. It must be supposed, in the absence of any proof to the contrary, that, perceiving the name of the payee in the note, he indorsed it on the presumption that the name of such payee, to whose order it was made payable, would also, at some time, appear on the note; for only thus would it become negotiable." The authorities, cited by him, are *Herrick v. Carman*, * *Seabury v. Hungerford*, † *Ellis v. Brown*, ‡ *Moore v. Cross*; § and, in the face of so many authorities, it is not easy to say that the demurrer is frivolous. We think the order, holding the demurrer to be frivolous, was erroneous, and that the judgment based thereon must be reversed, and the motion for judgment on the demurrer denied.

DANIELS and BRADY, JJ., concurred.

Judgment reversed, and motion denied.

LOUISA DOUAI WEHLE, RESPONDENT, v. JESSE B.
SPELMAN AND OTHERS, APPELLANTS.

Evidence—Statement of person to whom witness has been referred by plaintiff for information—when admissible.

Action to recover the damages sustained by the plaintiff in consequence of the unlawful taking of her property by the defendants. The principal dispute was as to the value of the goods. A witness, called by the defendants, was asked as to a conversation had by him with Charles Wehle, the brother and attorney of the plaintiff, soon after the taking of the goods, in relation to the amount of stock. The conversation was objected to by the plaintiff and excluded. The defendants then offered to prove that the witness was referred by Mrs. Wehle to her brother, as to the fact of how many goods were in the store, which evidence was objected to by the plaintiff and excluded. *Held*, that the rejection of the evidence was error.

* 12 Johnson, 159.

† 2 Hill, 80.

‡ 6 Barb., 263.

§ 19 N. Y., 237

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial, made upon the judge's minutes.

The action was brought to recover for the seizure of the property of the plaintiff, by virtue of certain attachments which were subsequently vacated and set aside.

Other facts appear in the opinion.

Fullerton, Knox & Crosby, for the appellants.

Charles Wehle and *L. H. Rowan*, for the respondents.

DAVIS, P. J.:

There is little or no difficulty in disposing of the great mass of the exceptions taken on the trial of this case. They were not well taken. But as to one of them, this cannot be said.

The principal question litigated on the trial, was the actual value of the goods taken from plaintiff's store. On the part of the plaintiff, the value was claimed to have been \$10,000 or \$12,000, while the defendants insisted that the value was below \$3,000. In the course of the trial, one Orville H. Clapp, who was a member of the firm of Butler, Broom & Clapp (which firm were a part of the attaching creditors, though not parties to this suit), was called and examined as a witness on behalf of defendants. His testimony chiefly related to the quantity of goods the plaintiff had in her store, and their value; and after giving his opinion, founded on his examination, and stating a conversation with plaintiff on that subject, he testified that about a week afterward, he had a conversation with Charles Wehle, in relation to the amount of stock the plaintiff had on hand. Charles Wehle, it already appeared, was the brother of plaintiff, and her lawyer. The conversation was objected to by plaintiff, and excluded by the court. The defendants' counsel then offered to show that the witness was referred, by Mrs. Wehle (the plaintiff), "to her brother, as to the fact of how many goods were in the store." This was objected to by plaintiff's counsel, and the objection was sustained by the court, and defendants excepted. The evidence offered was competent. If it had appeared that the plaintiff referred the witness to Charles Wehle, for the purpose of

getting from him, information on the subject of the amount of goods in the store, that act would make him her agent for the purpose of giving such information, and his statements made when applied to under such reference would be competent evidence against the plaintiff, so far as they related to that subject.

It was therefore error to exclude the offer, inasmuch as it already appeared by the preceding question, that the object was to get the statements on that subject, of Charles Wehle, before the jury.

What would have been their effect or purport, we are not able to see. It may easily be conjectured that the evidence, if given, would have been of little or no importance, but that it would have been of *none* cannot be legally seen. The defendants had the right to such declarations (if they first proved the offer), and to have the jury pass upon their weight, in connection with the other testimony. They related to the principal subject of controversy. And we cannot see that, if permitted to lay the proper foundation, the defendants would not have called out important declarations touching the quantity of the goods, and affecting materially the question of value. For this error, the judgment must be reversed, and a new trial ordered, with costs to abide the event.

DANTELS and BRADY, JJ., concurred.

Judgment reversed and new trial ordered, costs to abide the event.

EDWARD S. CLINCH, RESPONDENT, v. THE SOUTH SIDE
RAILROAD COMPANY OF LONG ISLAND, APPELLANT.

Corporation — Receiver of — how appointed — Chapter 151, Laws 1870.

The provisions of chapter 151, of the Laws of 1870, cover all the cases mentioned in title 4, chapter 8, part 8, of the Revised Statutes, providing for the appointment of a receiver of a corporation upon the petition of a judgment creditor, after execution returned unsatisfied; and, since the passage of said act, the remedies therein provided must be pursued.

The plaintiff recovered a judgment against the defendant, upon which execution was issued and returned wholly unsatisfied. Upon an affidavit showing these facts, and that the defendant was insolvent, he then applied, upon motion, eight days' notice of which had been given, for an order appointing a receiver. The

motion was granted, and a receiver appointed. *Held*, that the proceedings were irregular, as not being authorized by section 8, of chapter 151, Laws 1870, and that the order appointing the receiver should be reversed.

APPEAL from an order made at Special Term, appointing a receiver of the defendant corporation.

The facts are stated in the opinion.

Tracy, Catlin & Brodhead, for the appellant.

John H. Bergen, for the respondent.

DAVIS, P. J.:

The plaintiff in this action brought suit against the defendant in Kings, and recovered judgment, the roll whereof was filed in Kings, and transcript filed, and judgment docketed, in Queens and Suffolk counties. An execution in due form was issued to the sheriff of Suffolk county, and by him duly returned wholly unsatisfied. The defendant's railroad runs through the counties of Kings, Queens and Suffolk, and it has offices and stations in each of those counties. Upon an affidavit, showing these facts, and also that the railroad company is insolvent, the plaintiff applied, upon motion and eight days' notice, at the Special Term of the district, at chambers, for an order appointing a receiver. The defendant appeared and opposed such motion, and read on the hearing an affidavit, showing that on or about October 1st, 1872, the railroad company was mortgaged, to secure a million dollars of its bonds, to trustees, and that default having been made on such mortgage, the trustees have taken and are now in possession of, and operating, said railroad, and that the trustees have brought an action to foreclose the mortgage, which action was commenced before notice of this motion was given, and is still pending.

The motion of the plaintiff was granted, and Edward D. Gale was appointed receiver, and from the order appointing such receiver, this appeal is taken.

Prior to the act of 1870,* the provisions of chapter 8, part 3, title 4, of the Revised Statutes, remained in full force, unaffected

* Chap. 151 Laws of 1870, p. 421.

by the Code. They were expressly excepted from the operation of the Code, by section 471. The thirty-sixth and thirty-seventh sections of the statute,* provided that whenever a judgment at law, or decree in equity, shall be obtained against a corporation, and an execution issued thereon, shall have been returned unsatisfied, upon the petition of the person obtaining such judgment or decree, or his representatives, the Court of Chancery may sequester the property of such corporation, and may appoint a receiver of the same, and that upon a final decree, on any such petition, the court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof, to be made among the fair and honest creditors of such corporation, in proportion to their debts, etc.

These sections also point out the mode of instituting the proceedings, to wit: by petition of the judgment creditor; and they provide substantially for a formal suit in equity, to be commenced by petition, and terminated by a final decree upon hearing and adjudication.

Whether an affidavit and notice of motion, such as were presented in this case, would have been deemed a sufficient conformity to the statute, need not be determined, because it seems clear that the mode of proceeding pointed out by the statute, has been superseded by the new mode indicated by the act of 1870.

Section 3 of that act, declares that the receiver of the property of a corporation, can be appointed only by the Supreme Court, in a civil action, and in one of the following cases, upon at least eight days' notice of the application therefor, to the proper officers of such corporation: "1. In a civil action brought by a judgment creditor of the corporation, or his representatives, after execution has been issued upon such judgment, and returned unsatisfied, in whole or in part."

* * * * *

"5th. In the cases specifically mentioned in title 4, chapter 8, part 3 of the Revised Statutes."

The provisions of the act of 1870, clearly cover all the cases mentioned in the statute above referred to; and there seems to be no reason to doubt that the remedies given by the statute, and especially those named in the thirty-sixth and thirty-seventh sections,

* 2 R. S., Edm. ed., p. 493.

must now be pursued by a civil action, instead of by petition, as provided for in the former statute. This change is substantial and important. It substitutes a new form of procedure, which is exclusive of all pre-existing modes.

We are not at a loss to ascertain what a civil action is, for that is something distinctly defined by law, as distinguished from a special proceeding;* and section 471 of the Code declares that where a civil action shall be brought, such action shall be conducted in conformity to this act.

Whether an affidavit, made in the original action in which the judgment was recovered, with notice of a motion for the appointment of a receiver founded thereon, would have been sufficient before the act of 1870 or not, it is clear that it is not the commencement of a civil action, within the requirements of the act of 1870. The proceedings were, therefore, irregular, and the order based thereon was improvidently granted.†

The order appealed from should be reversed, with costs.

DANIELS and BRADY, JJ., concurred.

Order reversed, with costs.

THE BUCHANAN FARM OIL COMPANY RESPONDENT,
v. GEORGE WOODMAN AND THOMAS EVANS,
APPELLANTS.

Order of arrest — "Fiduciary capacity" — Fraudulent conspiracy — when must be set out in complaint.

The complaint alleged: "That at various dates between September 17, 1870, and March 20, 1873, the plaintiff deposited with the defendants, as its bankers, various sums of money, which said deposits, on the said 20th day of March, 1873, after deducting all credits due to said defendants, amounted in the aggregate to the sum of \$29,500, leaving the defendants, on said last mentioned day, indebted to the plaintiff in the aforesaid sum and interest." That the plaintiff had, since the said sum became due, demanded payment thereof from the defendants, who refused to pay the same, and that no part thereof had been paid.

* See Code, §§ 2, 3, 4, 5, 6.

† See *City of Rochester v. Bronson*, 41 How., 78; *Bangs v. McIntosh*, 23 Barb. 591; 6 Paige, 482; 10 Id., 290; *Mann v. Pentz*, 3 N. Y., 415.

Held, That these allegations showed only a cause of action arising upon contract, and that there was no averment from which it would be justly inferred that the indebtedness sued for, was for money received in "a fiduciary capacity," within the meaning of the Code.

The affidavits used by the plaintiff on a motion for an order of arrest, contained allegations tending to show a fraudulent conspiracy between Rose, the plaintiff's treasurer, and defendants, to get into the possession of defendants the money of plaintiff, so that Rose could use the same by defendants' aid and connivance, in his individual stock speculations. *Held*, that an action to recover for such fraudulent acts, could only be maintained upon a complaint charging the alleged fraud and conspiracy; that such a cause of action was inconsistent with the cause set forth in the complaint, and that an order of arrest in this action could not be sustained.

APPEAL from an order of the Special Term, denying a motion to vacate an order of arrest. The facts are stated in the opinion.

F. R. Sherman, for the appellants.

J. H. Watson, for the respondent.

DAVIS, P. J. :

The complaint in this action alleges, "that at various dates between September 17th, 1870, and March 20th, 1873, the plaintiff deposited with the defendants, as its bankers, various sums of money, which said deposits, on the said 20th day of March, 1873, after deducting all credits due to said defendants, amounted in the aggregate to the sum of twenty-nine thousand five hundred dollars, leaving the defendants, on said last-mentioned day, indebted to the plaintiff in the aforesaid sum and interest." "That the plaintiff has, since the said sum became due, demanded payment thereof from the defendants, but the defendants refuse to pay the same, and no part thereof has been paid; wherefore plaintiff demands judgment against the defendants, for twenty-nine thousand, five hundred dollars, and interest from March 20, 1873."

These allegations fail to show anything more than a cause of action arising upon contract for moneys had and received; and there is no averment, from which a just inference can be taken, that the indebtedness sued for, is for money received in a "fiduciary capacity," within the meaning of the Code. The moneys are alleged to have been deposited with defendants as the bankers of plaintiff, and the indebtedness is stated as the balance of a cur-

rent account, running through a period of two and a half years. The fair inference from the complaint is, that the moneys were deposited from time to time in the course of ordinary banking business, subject to checks at sight, and that it was neither intended nor supposed that the funds deposited were to be held in trust, but that the same were to be used, as customary with banks and bankers under such circumstances, in the usual course of their business. In such case, the relation is that of debtor and creditor, and not that of trustee and *cestui que trust*. The credit is given to the pecuniary responsibility of the banker, and not to his personal integrity, and the deposit becomes the property of the recipient, to be paid for on demand as a debt due and payable upon the checks of the depositor.

The right of arrest, under section 179 of the Code, does not, in such a case, exist or arise as a part of the cause of action.* “The test is whether the specified moneys ought in good faith to have been kept and paid over, or whether the agent had a right to use the money.”†

Under the complaint, in this case, the plaintiff will, at the trial, make out his cause of action by producing the accounts rendered (as described in the affidavits), and no question of tortious conversion can properly arise on the complaint.

Nor do the affidavits tend to establish any fiduciary relation between the parties, within the meaning of the section of the Code above cited. They may be said, perhaps, to show that Rose, the treasurer of plaintiffs, transferred his account, as treasurer, from the Ninth National Bank to the defendants, for his private convenience, and that defendants knew of that purpose; but they show that the deposits were received by defendants, as bankers, and so kept and continued till the balance was struck and counter-balanced, by conveying the same to the account of W. W. Rose, as a credit against his individual indebtedness. The question at the trial may be, whether the defendants had any right to balance the account by such a debit; but that question does not involve any fiduciary relation.

* *McBurney v. Martin*, 6 Robt., 502; *Goodrich v. Dunbar*, 17 Barb., 644; *Schudder v. Shiels*, 17 How., 420; *Bussing v. Thompson*, 15 How. Pr., 97.

† *Stoll v. King*, 8 How. Pr., 298.

Running through the affidavits on the plaintiff's part, are allegations tending to show a fraudulent conspiracy between Rose, the plaintiff's treasurer, and defendants, to get into the possession of defendants, the moneys of plaintiffs, so that Rose could use the same, by defendants' aid and connivance, in his individual stock speculations. That such a fraudulent conspiracy might give to plaintiff a cause of action against any or all the parties implicated in it, need not be controverted; but such an action must be maintained upon a complaint charging the alleged frands and conspiracy, and presenting to defendants the opportunity to take issue and have a trial by jury upon the fact of their guilt or innocence. Undoubtedly, such a complaint would present a case in which the right of arrest would be involved in the cause of action. But, under the present complaint, no such issue is tendered or triable; nor could it arise—except, possibly, as an incidental question affecting the alleged right of defendants to debit the account of Rose, as treasurer, with the balance due on his individual account. It is not at all material to the question, whether the money was received in a fiduciary capacity; and it is not averred in the complaint that the defendants received it tortiously, and are liable in an action for such a wrong. The cause of action, assuming it to exist for fraudulent conspiracy, alleged, or attempted to be, in the affidavits, is not consistent with the cause set forth in the complaint, and therefore the order of arrest in this action cannot be sustained.*

The order of arrest should therefore have been vacated. The order appealed from is reversed, with ten dollars costs of the appeal, and the motion to discharge the order of arrest is granted, with ten dollars costs.

DANIELS and BRADY, JJ., concurred.

Order reversed, with costs.

*7 Abb. Pr., 171; Wickes v. Harmon, 12 Abb. Pr., 476; S. C., 21 How. Pr. 462.

THE HOME INSURANCE COMPANY, PLAINTIFF, v.
WILLIAM WATSON AND ANOTHER, DEFENDANTS.

Attachment — bond — consideration of.

Certain moneys owing by the plaintiff to one Campbell, had been attached by the sheriff, in a suit brought by J. and D. Carolin against said Campbell. Judgment having been recovered in this suit, the plaintiff refused to pay over the money unless it was indemnified. A bond was accordingly executed by the defendants, conditioned to "indemnify, save, defend and keep harmless the said Home Insurance Company from and against the claims of the said James T. Campbell, and of all other persons claiming or to claim the said moneys so paid by the said insurance company to said sheriff, and of and from all costs, damages and expenses that shall or may happen or arise therefrom;" and the money was paid to the sheriff. Campbell subsequently sued the insurance company for the money, and was defeated, and judgment rendered against him, the costs and expenses of the company, in such suit, being \$2,887.91; Campbell being insolvent, this suit was brought upon the bond to recover said amount. *Hehl*, that defendants were not liable; that as to the claim of Campbell, it was established by the judgment of the court, in which he sought to enforce it, that he had none; and that the costs, damages and expenses included in the judgment, did not arise because of any just and lawful claim, but from the false assertion of one against which the covenant was not intended to indemnify.

Quere, whether the bond was not void for want of consideration, as it was the duty of the insurance company to pay over the money to the sheriff upon the recovery of the judgment in the attachment suit.

Chamberlain v. Beller (18 N. Y., 115) distinguished

CONTROVERSY submitted without action, under section 372, of the Code of Procedure.

The facts are stated in the opinion.

Thomas H. Hubbard, for the plaintiff.

M. Nolan, for the defendants.

DAVIS, P. J.:

The question in this case arises upon a bond executed by the defendants as sureties.

The sheriff of the city and county of New York had attached certain moneys, owing by the plaintiff to one James T. Campbell,

a resident of South Carolina, in a suit in the Supreme Court of this State, brought by James and Dennis Carolin against said Campbell. The regularity of the proceedings on the attachment is conceded. The indebtedness to Campbell is also admitted.

Judgment had been duly recovered in the attachment suit against Campbell, and execution duly issued. The sheriff on the execution demanded the attached moneys. The plaintiff refused to pay the same to him unless indemnified. The defendants thereupon executed the bond upon which the question now submitted arises, conditioned to "indemnify, save, defend and keep harmless, the said Home Insurance Company, from and against the claims of the said James T. Campbell, and of all other persons claiming, or to claim, the said moneys, so paid by the said insurance company to said sheriff, and of and from all costs, damages and expenses that shall or may happen or arise therefrom." Upon the execution of this bond, the insurance company paid over the attached indebtedness to the sheriff, who proceeded to apply the same to the execution and judgment. Afterward, Campbell sued the Home Insurance Company in the city of Charleston, to recover the same indebtedness. The company set up in defense, the suit in New York, the attachment and judgment, and the payment of the indebtedness to the sheriff; and, on this defense, successfully defeated the claim of Campbell, and recovered judgment against him, but were unable to collect their costs, Campbell having become insolvent. The company incurred expenses in defending the suit of Campbell, to the amount of \$2,337.91, which are admitted by the statement, to have been reasonable and proper. The question presented, is, whether the plaintiffs are entitled to recover upon these facts, of the defendants, the amount of the penalty of their bond.

It is insisted, first, that the bond is without consideration. At common law, the seal imports a consideration; but, under our statute, the question of actual consideration is an open one, subject to the same inquiry and defense as if the instrument were a simple contract.*

And the admission in the statement, that there was no other consideration for the bond than the forbearance to defend an action to

*2 R. S., 407, sec. 77.

recover the attached debt, and the payment, without suit or delay, of so much thereof as would satisfy the judgment, brings the question whether the consideration was good and sufficient directly before the court. There is no doubt, upon the facts admitted by the statements, that the sheriff was entitled to collect the attached indebtedness, and to receive at once from the company, so much of the money owing thereon, as would extinguish the judgment and his lawful charges. The company had no lawful right to refuse to pay it to him. There was no controversy whatever as to the regularity of the attachment and judgment, nor as to the indebtedness to the judgment debtor; and these facts were not only undisputed at that time, but their existence was subsequently established by the result of the suit in South Carolina. The attachment and judgment were a complete justification and defense of the company's making the payment to the sheriff; and, indeed, the sheriff had become the assignee and owner, by operation of law, of so much of the indebtedness to Campbell as was paid to him.

The company, in making the payment, did nothing more than the law, at the suit of the sheriff, would have compelled them to do; and the sheriff would have been awarded costs by the law, as his indemnity for the delay and the expense of the suit. It may well be doubted whether the bond is not without lawful consideration; but, in the view we take of its condition, it is not necessary to determine that question.

No claim appears to have been made to the money by any person except Campbell, the judgment debtor. Upon the facts, before us, the bond must be deemed an indemnity against his claim. He is shown by the result to have had no claim, and it is established that his suit for the indebtedness was nothing but a false clamor, which has been proved to have been groundless, by the judgment of the court in which he sought to enforce it. So far, therefore, as relates to indemnity against Campbell's claim, there has been no breach of the covenant, for no claim has been established, and none existed which could have been established. But the condition is not only to indemnify against any claim of Campbell, but against all costs, damages and expenses which the plaintiff might suffer by reason of his claim. This is to be construed in con

sonance with the principal object of the indemnity, which was the claim itself. Where that is shown not to have existed at all, the costs, damages and expenses cannot be said to have arisen because of any just and lawful claim, but because of the false assertion of one. The covenant is not to indemnify against false and unlawful assertions of Campbell, or of the whole world, to the indebtedness of the company, but in substance is to indemnify the company in paying the money to the sheriff, if it shall turn out that Campbell, or anybody else, shall establish a better title, and compel the payment to him; and in that event, not only to make good to the company the amount paid to the sheriff, but also all costs, charges and expenses, to which it shall be subjected by reason of the superior title.

Regarding this as the true construction of the condition of the bond, there has been no breach of it, entitling the plaintiff to recover, and hence the defendants are entitled to judgment, with costs.

*Chamberlain v. Beller** was upon a bond to the sheriff, under the statute. The sheriff's jury having been waived, the court held that the bond was within the statute notwithstanding the waiver; and its effect was therefore to compel the sheriff to proceed where he would not at law have been obliged to act; the verdict which was assumed by the waiver being his protection for refusing to proceed until the bond should be given. We do not consider that case to be in point.

Judgment is therefore ordered for the defendants, with costs.

BRADY and DANIELS, JJ., concurred.

Judgment ordered for the defendants, with costs.

* 18 N. Y., 115, p. 119.

ISIDORE MOSELMAN AND CONSTANT POELAERT,
TRUSTEES OF THE ESTATE OF SICHEL & COMPANY, APPEL-
LANTS, v. MEYER CAEN, RESPONDENT.

Complaint—failure to show title to subject-matter of action—when objection may be taken—Trustees appointed under foreign bankrupt law—rights of, in this State.

A complaint must always show title in the plaintiffs of the subject-matter of the action, or such an interest therein as indicates them to be proper parties to the litigation; otherwise it fails to state facts sufficient to constitute a cause of action in favor of plaintiffs against defendant. This objection may be taken at the trial, and need not be raised by demurrer.

The courts of this State will not recognize or enforce a right or title acquired under foreign bankrupt laws, or foreign bankrupt proceedings, so far as affects property within their jurisdiction, or demands against residents of this State. There is no distinction, in this respect, between cases of voluntary and of involuntary bankruptcy.

The plaintiffs were trustees in bankruptcy of the firm of Sichel & Co., the members of which firm were residents, and subject to the laws, of the kingdom of Belgium, and were adjudged bankrupts in proper proceedings for that purpose in the Tribunal of Commerce, of the city of Brussels. As such trustees they claim to recover the value of certain property alleged to have been fraudulently obtained from the said bankrupts. At the trial the plaintiffs were nonsuited. *Held*, that this was proper, as the complaint did not state facts sufficient to constitute a cause of action.

APPEAL from a judgment in favor of the defendant, entered upon an order dismissing the plaintiffs' complaint herein. The facts are stated in the opinion.

Another controversy between these same parties, in relation to the same property, has already been passed upon by the court, and is reported in 34 Barbour, page 66.

Malcolm Campbell and John B. Fogerty, for the appellant, cited *Fulton Ins. Co. v. Baldwin* (37 N. Y., 648); *Patchin v. Peck* (38 id., 39); *Donnell v. Walsh* (33 id., 44); *Robbins v. Wells* (18 Abb., 191); *Lee v. Wilkes* (27 How., 341); *Eaton v. Baloom* (33 id., 80); *Hoyt v. Thompson* (1 Seld., 320); *Johnson v. Hunt* (23 Wend., 87); *Abraham v. Plestoro* (3 id., 358); Story Conflict of Laws (§ 419).

Lewis Sanders and *George N. Sanders*, for the respondent, cited *Willits v. Waite* (25 N. Y., 586); *Baldwin v. Hale* (1 Wall., 223); *Kelley v. Drury* (9 Allen, 27); *De Witt v. Chandler* (11 Abb., 472).

DAVIS, P. J.:

On the trial of this case, the plaintiffs offered to prove all the facts alleged in the complaint; to which the defendant's counsel objected on the ground that the plaintiffs claiming as foreign trustees appointed by a foreign court, had no right to maintain this action; which objection was sustained. Plaintiffs excepted. Subsequently the defendant moved to dismiss the complaint, on the ground that it did not contain facts sufficient to constitute a cause of action. The court granted the motion and dismissed the complaint, to which plaintiff excepted.

It is obvious that the only point determined by the court below was that raised by the specific objection, to wit: that the trustees in this case have no right to maintain the action. It would not be right therefore, if this court deemed the other grounds now asserted by the counsel for the respondent, to be well taken, to affirm the judgment upon them, because if they had been put forward in the court below, it does not appear that amendments of the complaint, sufficient to have obviated such objections, would not have been allowed.

It is true, as insisted by appellants' counsel, that the point on which the court disposed of the case, might properly have been taken by demurrer; but it was not of the class that is to be deemed to have been waived unless so taken.* A complaint must always show title in the plaintiffs, of the subject-matter of the action, or such an interest therein as indicates them to be proper parties to the litigation; otherwise it fails to state facts sufficient to constitute a cause of action in favor of plaintiffs against defendant.†

These cases hold, substantially, that a failure to show in the complaint, the title or interest above suggested, leaves such complaint open to the objection that it does not state facts sufficient to constitute a cause of action, and that the objection on that

* Code, sec. 148.

† *Davis v. The Mayor of New York*, 14 N. Y., page 506; *Greene v. Breck*, 10 Abb., 43; *De Witt v. Chandler*, 11 id., 459.

ground may be raised at the trial as well as by demurrer. The plaintiffs show themselves, by the averments of the complaint, to be trustees in bankruptcy of the firm of Sichel & Company. The members of that firm were residents of and subject to the laws of the kingdom of Belgium, and were adjudged bankrupts in proper proceedings for that purpose in the Tribunal of Commerce of the city of Brussels. As such trustees, the plaintiffs claim to recover the value of property alleged to have been fraudulently and tortiously obtained from said bankrupts. It is not distinctly averred whether the bankruptcy of Sichel & Co. was voluntary or involuntary (in the sense in which those terms are used in the courts of bankruptcy of the United States), but it is assumed by the appellants that they were voluntary bankrupts.

It seems to be the settled law of this State that our courts will not recognize or enforce a right or title acquired under foreign bankrupt law or foreign bankrupt proceedings, so far as affects property within their jurisdiction, or demands against residents of the State.* The distinction between cases of voluntary and involuntary bankruptcy does not seem to have been considered important; perhaps because in either case the transfer of title is by operation of law or by adjudication of the courts. We feel bound by the rule laid down in the various cases, and if any such distinction as that relied upon by the appellants is to be made, it should come from the court of last resort, upon whose authority it will be final. The judgment should be affirmed.

BRADY and DANIELS, JJ., concurred.

Judgment affirmed.

* See *Mosselman v. Caen*, 34 Barb., 66; *Abraham v. Plestoro*, 3 Wend., 538; *Johnson v. Hunt*, 23 id., 87; *Holmes v. Remsen*, 20 John., 229; *Willets v. Waite*, 25 N. Y., 577; *Hoyt v. Thompson*, 19 id., 224, 235; 2 Kent's Com., 406, 407; *Hoyt v. Thompson*, 1 Seld., 320; *Harrison v. Sterry*, 5 Cranch, 298; *Ogden v. Saunders*, 12 Wheat., 213.

CHARLES W. MOORES AND ANOTHER, RESPONDENTS, v.
BENJAMIN P. LUNT AND ANOTHER, APPELLANTS.

Chapter 482, 1862 — Lien on vessels — not created for materials used in construction of a vessel in another State — Pleadings — what allegations in, show that indebtedness arose in this State.

An allegation in a complaint that the articles mentioned as sold were purchased and furnished to the vendee at the city of New York, is sufficient to show that the contract was made and the indebtedness arose in this State.

A lien does not arise under chapter 482 of the Laws of 1862, for materials furnished in this State, and used in the construction of a vessel in another State.

APPEAL from a judgment, entered upon an order overruling the demurrer put in to the complaint in this action.

Edward H. Hobbs, for the appellants.

George W. Siclen, for the respondents.

DAVIS, P. J.:

This is an appeal from a judgment, entered upon an order overruling a demurrer to the complaint. The grounds of demurrer, stated, are: First, that the court has no jurisdiction of the subject of the action. Second, that the complaint does not state facts sufficient to constitute a cause of action.

The complaint avers that about the 18th of July, 1871, one Manson was the builder of an unfinished steamship or vessel now called and known by the name of the *Metropolis*, then lying upon the stocks, and in the course of construction at Newburyport in the State of Massachusetts; that said Manson, being the builder of said vessel as aforesaid, contracted a debt, at the city of New York, with the plaintiff, for materials and articles (specifying them), which were furnished in this State, to wit, at the city of New York, "for and toward the building, fitting, furnishing and equipping said steamship or vessel." The complaint then shows that application for a warrant was made to one of the justices of this court, in September, 1871, to enforce the lien of the said debt; that a war-

rant was issued to the sheriff of the city and county of New York, who attached and seized the vessel; that thereupon, the defendant, Benjamin P. Lunt, and others, being the owners of said ship, applied to said justice for an order discharging the attachment, and executed the bond, set forth in the complaint, conditioned that the obligors will pay the amount of the claims and demands which plaintiffs "shall establish to have been a subsisting lien upon such steamship or vessel, Metropolis, pursuant to the provisions of said act" (the act of April 24th, 1862, therein before recited), "at the time of exhibiting the same;" that thereupon the vessel was discharged, and this action was commenced upon the bond. There seems to be no doubt, under the allegations of the complaint, that the debt was contracted within this State, nor that the articles were furnished to the builder within this State; nor that they were furnished for and toward the building, fitting out, furnishing and equipping of the vessel, then on the stocks and in process of construction at Newburyport, Massachusetts. The point made by the demurrants, that the complaint does not show that the articles actually entered into the construction of the vessel, and therefore fails to show a lien, does not appear to us to be well taken. It is undoubtedly true, that it must be shown upon the trial, that they actually entered into such construction; * but the averment of the complaint follows the language of the statute; † and to sustain the averment, the proof above mentioned must be given. The true construction of the language used by the statute and by the pleading is, that the materials were furnished for and entered into the construction of the vessel; ‡ and we think it, therefore, quite sufficient in a suit upon a bond of this character. It is urged, also, that the complaint does not aver the delivery of the articles; but that fact, so far as necessary to be averred, must be deemed to be included in the words, "*furnished for and toward the building*," etc., of the ship. We think it is not correct to assert that the debt must be held to have been contracted within the State of Massachusetts, because the articles furnished were used in the construction of the ship in that State. The statute requires that the

* *Hiscock v. Harbeck*, 2 Bosworth, 506; *Phillips v. Wright*, 5 Sandford, 342.

† Chapter 482, Laws 1862, pp. 956-957, § 1.

‡ See *Phillips v. Wright*, 5 Sandford, at p. 362.

debt, to be a lien, must be contracted within this State ; and the averments of the complaint are, substantially, that the articles mentioned were purchased and furnished at the city of New York, to the builder named, for the purposes mentioned. We think the contract and indebtedness are sufficiently shown to have arisen within this State.

But the principal question in the case is, whether, upon the averments of the complaint as above construed, a lien upon the vessel is shown under the act of 1862. It appears that the ship was in process of construction at Newburyport in the State of Massachusetts ; and that while in such process the builder came to New York and bought the articles mentioned, of plaintiffs, at the prices stated, taking them to Newburyport and applying them toward the building of the ship then on the stocks ; and the point is, whether a lien on the vessel thereby arose by force of our statute, which can be enforced as such, under its provisions, whenever the ship, after being completed and launched, shall sail into the jurisdiction of this State. The lien created by the act of 1862, is purely statutory. It does not arise or exist except by operation of the statute ; and in all cases where it exists, it arises at once (so far as the question in this case is concerned) upon the actual use of the materials furnished in the " building, repairing, fitting, furnishing or equipping " of the ship. It is the lien which arises at that time for the enforcement of which the statute provides the remedy of attachment. Does such a lien arise under the statute, where the materials are furnished for, and used in the construction of a ship in a foreign State ?

The statutes of this State have no extra-territorial force. The act of 1862 cannot be enforced in Massachusetts. None of the judges of the courts of that State could issue, under the provisions of our act, the attachment thereby given, to enforce the lien at Newburyport, before the vessel should have sailed from that port. Nor would those courts have recognized any lien on the ship by force of our statute, under the facts of this case.

If the statute has no extra-territorial effect, how can it be said to have created a lien upon the ship while beyond our jurisdiction ? It is difficult to see the precise grounds upon which such a lien can be said to stand. If it be argued that a lien springs up by force of

the statute, whenever the ship comes within our jurisdiction, the answer will be that such a case is not provided for by the statute; and it is doubtful whether it can be enacted by a State, that a lien which did not already exist, shall arise from the act of sailing into the jurisdiction of a State, to be enforced by the State courts. Such a consequence of inter-state navigation, might conflict with the federal Constitution and the laws of congress. It is not necessary, however, to pass upon that question, because a careful examination will show, as it seems to us, that it was not intended by the act of 1862, to create liens upon vessels not within this State, and there incurring debts for the purposes mentioned in the act. The iteration and reiteration of the words, "within this State," and "in this State," in the first section, seem to indicate an intention that those words shall be taken distributively, and applied to all the material facts made by the act elementary to the lien.

The second section first provides, that the debt shall cease to be a lien at the expiration of six months after the debt was contracted, unless, at the time when said six months shall expire, such ship or vessel shall be absent from the port at which such debt was contracted, in which case, such lien shall continue until the expiration of ten days after such ship or vessel shall *next* return to said port. This provision cannot be applied to a vessel constructed or repaired in a foreign State, without holding that the lien continues without limitation until the vessel shall have once entered the port where the debt was contracted, and afterward "*next return*" to the same port. A more sensible view would be to hold that the words, "next return to said port," when coupled with the words in the first section, which require the debts to be contracted "within the State," indicate a clear intent to limit the lien to vessels within the State when the lien accrues.

The next provision of the second section, is, that "in all cases, such debt shall cease to be a lien upon such ship or vessel, whenever such ship or vessel shall leave the port at which such debt was contracted, unless the person having such lien shall, within twelve days after such departure, cause to be drawn up and filed, specifications of such lien, which may consist either of a bill of particulars of the demand, or a copy of any written contract under which the work may be done, with a statement of the amount claimed to

be due on such vessel, the correctness of which shall be sworn to by such person, his legal representative, agent or assigns." The third section declares that such specification shall be filed in the office of the clerk of the county in which such debt shall have been contracted, etc.

It does not seem possible that the legislature intended by this provision, to establish perpetual liens on ships constructed or repaired abroad, for materials sold and furnished in this State, with no requirement of any public notice thereof, unless the ship shall enter the port where the debt was contracted, and afterward depart therefrom.

By applying these provisions only to cases of vessels built or repaired, or purchasing and receiving in this State the articles and services named in the act, we have a system of liens, simple and easy of enforcement; but by applying them to vessels building in other States, we have one full of difficulty and embarrassments, both to the lienor and to the property sought to be affected, and leading to grave conflicts between our statute of liens, and the statutes of other States.

The general purpose of the statute in such cases, is obviously to protect our own citizens, who furnish materials, etc., to ships and vessels, from liability to losses from the transitory nature of the property benefited, the act of using which generally carries it out of the jurisdiction of our local tribunals. A specific lien, under certain circumstances, is given, and one of those circumstances, in our opinion is, that the work shall be done, or the materials shall be furnished and applied, for which the lien is claimed within our territorial jurisdiction.

The judgment and order must be reversed, and judgment ordered upon the demurrer for the defendants.

DANIELS, J., concurred.

Judgment and order reversed, and judgment ordered for the defendants upon the demurrer.

JOHN S. PROUTY, RESPONDENT, v. THE MICHIGAN
SOUTHERN AND NORTHERN INDIANA RAILROAD
COMPANY, JESSE HOYT AND OTHERS, APPELLANTS.

*Foreign corporations — Jurisdiction of the courts of this State over — Preferred stock —
Dividends — Actions against consolidated corporations.*

The provisions of section 427 of the Code of Procedure, relating to actions against foreign corporations, do not limit the jurisdiction of the courts of this State to cases in which the cause of action has arisen, or the subject, or some property to be acted upon, is situated within this State.

Howell v. Chicago & N. W. R. R. Co. (51 Barb., 378), overruled in its construction of section 427 of the Code.

Construction given to statutes relating to the issuing of preferred stock, and the validity of the issue considered.

When a certificate of stock provides that the stock is "entitled to dividends at the rate of ten per cent per annum, payable semi-annually out of the net earnings of said company," and is "also entitled to share pro rata with the other stock of the company, in any excess of earnings over ten per cent per annum, and the payment of dividends as aforesaid" was thereby guaranteed; *held*, that the right of the stockholders to receive this ten per cent dividend, so guaranteed, was not limited to the net earnings of the year in which it was agreed that the distribution of these net earnings should be made, but that the certificate of guarantee was, in substance, a pledge of all the future earnings of the road for the payment of this yearly ten per cent dividend.

The failure of the corporation, for want of net earnings, to make the dividends on the days when they fell due, did not relieve it from its obligation to make them when the necessary earnings should afterward be realized.

In an action in a court of equity, brought by one of a class of persons, on behalf of himself and all others similarly situated, the rule is, that all persons composing the class, may come in under the decree and prove their rights and obtain satisfaction equally with the plaintiff, being thereafter in all respects treated as parties to the suit.

An objection that stockholders should have been made parties to the suit, *held* untenable under the decision in *Thompson v. Erie R. R. Co.* (45 N. Y., 468).

Statutes of other States cannot for the first time be read upon the hearing of an appeal.

Culler v. Wright (23 N. Y., 472-474) disapproved; *Hunt v. Johnson* (44 N. Y., 27) followed. The question as to who is a proper party defendant, in an action brought on an obligation of one of several consolidated corporations, after their consolidation, discussed.

APPEAL from a judgment against the defendants, entered upon the report of a referee, and from an order for such judgment.

FIRST DEPARTMENT, JULY TERM, 1874.

This action was brought by the plaintiff, claiming to be the owner of 484 shares of preferred stock, issued by the defendant, the Michigan Southern and Northern Indiana Railroad Company, a foreign corporation, on his own behalf and that of other holders of such preferred stock, to compel this foreign corporation and its directors, among other things, to apply its future net earnings to the payment of dividends in arrear upon such stock. The following is a copy of the certificates of the preferred stock :

**THE MICHIGAN SOUTHERN AND NORTHERN INDIANA
RAILROAD COMPANY.**

No. (Vignette) Shares.

GUARANTEED TEN PER CENT STOCK.

This is to certify that

entitled to

shares of one hundred dollars each in the guaranteed capital stock of the Michigan Southern and Northern Indiana Railroad Company, denominated "Construction Stock." Said stock is entitled to dividends at the rate of ten per cent per annum, payable semi-annually, in New York, on the first days of June and December in each year, out of the net earnings of said company, and is also entitled to share *pro rata* with the other stock of the company, in any excess of earnings over ten per cent per annum, and the payment of dividends as aforesaid is hereby guaranteed. The said stock is transferable only on the books of the company, at their office in the city of New York, by the said stockholder, in person, or by

attorney,

on the surrender of this certificate.

In witness whereof, the said company have caused the same to be registered, and this certificate to be signed by their President and Treasurer, and countersigned by their Secretary.

Dated at New York, this day of 185

President.

Treasurer.

The referee found that this defendant should be restrained from declaring dividends, or making other disposition of the funds of the corporation, till the amount in arrear and unpaid on the preferred stock, should be paid. That a reference should be ordered, to advertise and give notice to other preferred stockholders to come in and prove their claims, etc. This report was confirmed by the court.

James Matthews, for the appellants.

Lucien Birdseye, for the respondent.

DANIELS, J. :

This action was brought by the plaintiff, a resident of the State of New York, on his own behalf, and on behalf of others having like grounds of complaint, against the corporate defendant, a railway corporation organized and existing under the laws of the States of Ohio, Michigan and Indiana, to secure the payment of dividends, agreed to be paid by such defendant upon certain shares of preferred and guaranteed stock issued by it in the year 1857. By the terms of the certificates issued, it was stated that the stock was "entitled to dividends at the rate of ten per cent per annum, payable semi-annually in New York, on the first days of June and December in each year, out of the net earnings of said company," and was "also entitled to share *pro rata* with the other stock of the company, in any excess of earnings over ten per cent per annum, and the payment of dividends, as aforesaid," was thereby guaranteed.

The ten per cent dividends upon the stock, were not paid from the time when it was issued until on or about the 1st day of July, 1863. And neither then, nor at any time since, was any payment made of the dividends in arrear. The object of this action was the recovery of those arrears, and the judgment has provided for that, by requiring the net earnings of the company to be applied to their payment.

It was urged upon the trial, and the objection was again taken on the argument of this appeal, that the court had no jurisdiction over the cause of action presented by the complaint, because the railroad company was a corporation, formed and existing under the

laws of other States, and the other defendants proceeded against, were its directors. Numerous adjudged authorities were referred to, in support of, as well as against, the objection, most of which it will be unnecessary to consider. For neither of them, when properly limited, directly sustains or defeats it.

The jurisdiction of this court over actions against corporations created under the laws of other States and countries, has been defined and declared in very plain terms by statute; and it cannot be necessary to look very much beyond them, in order to ascertain and determine the design of the legislature in its enactment. By that statute, it has been provided, and the provision has been in force during the entire pendency of this action, that an action may be maintained in this, and certain other courts, by a resident of this State, against a corporation created by or under the laws of any other State, government or country, *for any cause of action*.^{*} This is a broad and unqualified provision, containing nothing justifying the restriction placed upon it by the Special Term, in deciding the case of *Howell v. Chicago and North-western Railway Co.*[†] And that must have been afterward the conviction of the learned judge who decided that case, for it was at a court held by himself, that the order was made in this cause, directing that judgment should be entered upon the report made, by the referee. If that was not so, then this case is so far distinguishable in its facts from that, as to render the decision then made inapplicable to the objection now urged against the jurisdiction of the court. The case of *Whitehead v. Buffalo and Lake Huron R. R. Co.*,[‡] has no bearing upon the point presented, because the plaintiff in it was not a resident of this State, and his right to maintain his action, depended upon the other provision contained in the section. The language used by the legislature is full and explicit; and, like all other statutes, should be construed according to the fair import of its terms, in order to carry into effect the object of its enactment.[§] And as so construed, it includes the present action.

It is further objected, in support of the appeal taken from the judgment, that the stock, upon which the dividends are claimed, was issued without authority. The corporation issuing it was

^{*} Code, § 427.

[†] 51 Barb., 378.

[‡] 18 How., 318.

[§] McCluskey v. Cromwell, 1 Kernan, 593, 901, 902.

formed by the consolidation of two pre-existing corporations, operating a continuous line of railroad from Toledo, in the State of Ohio, to Chicago, in the State of Illinois, known as the Michigan Southern and Northern Indiana Railroad Companies. Before the consolidation, by section 20 of an act of the legislature of the State of Indiana, approved May 11, 1852, it was provided that, "for the purpose of providing means for the payment of its debts, and for the construction of its road, materials or equipments, such company may issue a preferred stock to an amount not exceeding one-half of the amount of its capital, with such priority over the remaining stock of such company, in the payment of dividends, as the directors of such company may determine, and shall be approved by a majority of the stockholders."

And this provision was applicable to the Northern Indiana Railroad Company, one of the constituents of the consolidation.

By another act, passed by the legislature of the State of Michigan, approved March 28th, 1850, and applicable to the Michigan Southern Railroad Company, it was enacted by sections 3 and 4, that the company, for the purpose of providing means for the payment of its debts, and for the construction, extension and completion of its railroads, shops, depots, buildings and equipments, might "create and issue shares of guaranteed stock, to be denominated 'construction stock,' to such an amount as it may determine, not, (with the original stock) to exceed the amount of their capital stock allowed by law, which construction stock shall be entitled to such dividends, and payable at such place, and in such manner, and with such preference over the remaining stock of said company, in the payment of dividends, as the directors of said company may determine, and as shall be approved by the holders of a majority of the stock represented at their annual meeting."

Section 5, of an act passed by the legislature of the State of Ohio, approved March 3d, 1851, conferred general and unrestricted authority on the Northern Indiana Railroad Company, created by its provisions, to consolidate with any railroad company, then or afterward formed or incorporated in the States of Michigan or Indiana, under any name mutually agreed upon, from which time it was to become a portion of such company. And by section 2, of an act of the legislature of Illinois, approved February 29th,

1854, which was before the consolidation was effected, it was provided that any intersecting railroad companies, having continuous lines, should be authorized to consolidate their property and stock with each other, and by the name agreed upon, should "be a body corporate and politic," with "all the powers, franchises and immunities, which the said respective companies shall have, by virtue of their respective charters, before such consolidation."

The act of the legislature of the State of Indiana, approved February 23d, 1853, allowing railroad companies of that State to "intersect, join and unite their railroad with any other railroad, constructed or in process of construction," in that "or in any adjoining State at such point on the State line, or at any other point," "mutually agreed upon," was equally as full and unrestricted. For it provided that it might be done, and the companies consolidated, "upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining State, with whose road or roads, connections are thus formed; provided their charters authorized said railroad to go to the State line, or to such point of intersection."

By section 50, of an act of the legislature of the State of Michigan, approved February 13th, 1855, which was also before the consolidation, it was still further provided, that any railroad company in that State, having a continuous or connected line with any other railroad company, might consolidate with such company, either in or out of that State, into a single corporation; and that "such new corporation shall possess all the powers, rights and franchises, conferred upon such two or more corporations, and shall be subject to all the restrictions, and perform all the duties, imposed by the provisions of their respective charters, or laws of organization," not inconsistent with the provisions of that act. And by another act, enacted and approved at the same time, by which the particular consolidation of the Michigan Southern and Northern Indiana Railroad Companies was explicitly authorized, it was provided, that "all the franchises, property, powers and privileges," then "enjoyed by the Michigan Southern Railroad Company, and all the restrictions, liabilities and obligations, imposed upon said two corporations by virtue of their respective charters, and all contracts by and with either or both of said corporations, shall apper

tain to said united corporation, in the same manner as if the same had been contained in, or acquired under, an original charter, or made by or with said consolidated corporation."

Under and pursuant to these various provisions, an agreement was entered into by the different companies, for their consolidation into one corporation, on the 25th of April, 1855, with the consent of their respective stockholders. And, by the agreement then made, it was provided and agreed, that "all and singular their several and respective franchises, privileges and immunities," should henceforth "be the estates, property and effects, franchises, privileges and immunities of" the "consolidated company, to all intents and purposes;" and that it should "have all the powers, franchises, immunities, property and privileges," "enjoyed by the said parties of the first part, or the said parties of the second part," which included the constituent companies, "or which either of the said respective companies of the said first and second parts have, or had, by virtue of their respective charters," before the execution of such agreement.

Under these statutory provisions, and the stipulations contained in the agreement made by the consolidating companies, there seems to be no room, whatever, for doubting the power of the new corporation to issue preferred and guaranteed stock, provided it was done with the consent of its stockholders, and it did not exceed the prescribed limits of the capital of the consolidated corporation. The power was fairly given to the constituent corporations, both by the laws of Indiana and Michigan. For no essential difference can exist between preferred stock, having priority over the remaining stock in the payment of dividends, and stock to which that preference may be guaranteed. In the one case, the agreement to preserve the preference and pay the dividend before dividends may be paid on the common stock, is to be clearly implied, while in the other it is explicitly expressed. The obligation is substantially the same in each instance. And, for that reason, there was no practical difference in this respect, in the authority conferred upon either corporation, concerning the right to issue such stock.

The admitted, as well as undenied, allegations of the complaint, showed that the capital of the consolidated corporation was fixed at the sum of \$12,000,000, of which \$3,000,000 remained

unissued when the preferred and guaranteed stock was provided for and issued. This stock did not exceed that amount, and its issue was unanimously provided for and authorized by the stockholders, at their regular annual meeting in April, 1857, and by the action of the board of directors. This action was made the subject of some criticism by the defendants' counsel, because it was taken to carry into effect the resolution adopted on the subject by the stockholders. But it is not justly subject to question; for, in any view which may be taken of it, the board did provide for and sanction the creation and sale of this stock, precisely in the form in which it was offered to the company's stockholders. The latter were the only persons who could by any possibility be injuriously affected by it, because it postponed their right to dividends, until the stipulated ten per cent should be paid, out of the net earnings of the company, on the new stock under the guaranteed preference given to it, when they unanimously consented to relinquish their right to dividends until the stipulated ten per cent per annum should be paid upon the new stock. That would seem to be sufficient to remove all objection to its validity, even if it had not been specially authorized by the statutes referred to, and the agreement made for the consolidation, as long as the company, at the time, possessed the power to issue stock to the additional extent of \$3,000,000. What its form should be, could only be important to the owners of the preceding stock, and when they waived their right to dividends in its favor, no ground for complaint could exist in favor of other persons, or of the corporation issuing the stock. The provisions of the statutes requiring the dividends to be equally distributed among the stockholders of the company, in no way affect the validity of the guaranteed stock; they were made to secure the observance of the ordinary rights of the stockholders; and it was contemplated that such rights might be surrendered by them, in the provisions made for preferred and guaranteed stock, which were rendered dependent on the assent of a majority of the ordinary stockholders. Their rights were subject to this qualification, and they unanimously accepted it in favor of the stock afterward issued.

As no reason exists for doubting the validity of the preferred and guaranteed stock, it becomes necessary to consider whether the

holders of it are entitled to their stipulated dividends out of the net earnings of the company, for years succeeding those in which, by the terms of the certificates, they were rendered payable. The circumstances existing at the time when the stock was provided for and issued, and which may properly be considered in its construction, warranted the expectation that the dividends, rendered payable on the first days of June and December of each year, by the terms of the certificates, could not be paid in the financial condition in which the company then was. For its floating debt was larger than the amount which could be realized from the sale of the preferred stock created for its payment on the terms upon which it was offered to the stockholders of the company. It was reasonably to be inferred, therefore, that there would not at once be any fund available for the payment of the stipulated preferred dividends, inasmuch as the earnings of the company would probably be all required for the payment of its floating and pressing indebtedness. So that it could hardly have been the design of the corporation, in issuing the certificates for the guaranteed stock, to limit their holders' right to dividends to the net earnings of the year, in which it was agreed the stipulated distribution of them should be made.

The language used in the certificates, embody the same conclusion. For, while the ten per cent dividends are expressly made payable out of the net earnings of the company, it is also agreed by the guaranty following, that the dividends shall be paid in that manner. The undertaking is explicit, that the holders of the stock shall receive their annual ten per cent out of the company's net earnings. It was clearly designed that they should have that amount for each year upon their investment. And as they could receive it only from the net earnings of the company, and it was certainly intended they should have ten per cent per annum, at least, upon the investment, if those earnings proved insufficient for the payment at the times mentioned in the certificates, it must have been designed that they should be afterward paid, whenever the net earnings of the company would permit that to be done. There could have been no other or different object for the positive stipulation, that the holders of the stock should receive ten per cent per annum for their money. Although an investment in stock, it was

substantially a loan to the company, to relieve it from pressing necessities. And it could hardly have been induced, under the circumstances, on terms as favorable to the borrower, without the guaranty that all the net earnings were rendered liable for the payment of the annual dividends mentioned in the certificates. And by that, the company positively agreed that they should be so paid. Its apparent object was to render the ultimate payment uncontingent, whenever the net earnings proved sufficient to enable the company to make it. That, though not in the express terms of the certificate, is its import and spirit. And it must have been so understood by the persons purchasing the stock. They had the right to assume that to be the character of the obligation created by it, and the company should be held to its performance in that way. In substance, it constituted a pledge of the future net earnings of the company, for the payment of the yearly ten per cent dividends. That was its main expectation and purpose. It is true, that, by its terms, it contemplated the creation of a sufficient fund to enable the company to pay during each year. But, if that expectation failed, nothing was inserted in the certificate, discharging the company from all future obligation of payment, when the fund should be sufficient to make it. The stipulations for the payment, and the guaranty that the dividends should be paid out of the net earnings, as stipulated, are consistent with the existence of no other design, than that the holders of the preferred shares should receive their ten per cent per annum, in case the net earnings proved equal to that end. The holders were given an interest in the clear profits of the company, equal to the ten per cent which it was agreed they should receive from that source. The dividends mentioned, are payable, generally, out of the net earnings of the company. And it would be doing more than what it was agreed should be done, if the court should limit the right to payment, to the earnings of any one particular year. The substantial obligation of the corporation, was to pay ten per cent per annum on the stock, out of the net earnings of the company. And the days on which the dividends were to be made, were alone contingent upon its ability to make them. The failure, for want of net earnings, to make the dividends on those days, did not exonerate the corporation from the general

and paramount obligation to make them, when the earnings necessary for that purpose should afterward be realized.

A somewhat similar point was presented for the construction of an act of parliament providing for preferred stock, in the case of *Henry v. Great Northern Railway Co.** There was no obligation to make payment of the stipulated dividends at any particular time, in that case, beyond what might be inferred from the undertaking that they should constitute a particularly specified sum per year. It could reasonably be inferred, from that circumstance, that the obligation at least existed, to make the dividends annually. For that was the apparent purpose of the defendant, according to the form and import of the stock issued. But the court held that the stockholder was not deprived of his right to dividends, because the earnings, out of which they were expected to be made, were not realized during the year in which, by the terms of the stock issued, they ought to have been paid. On the contrary, the stock was held to be "a charge on all accruing profits, at the stipulated rate, before anything is divided among the ordinary shareholders. This is, substantially, interest chargeable exclusively on profits."† A similar conclusion was maintained in *Taft v. The Hartford, Providence and Fishkill R. R. Co.*,‡ where the action failed, because no net earnings had been received.§

From these and other authorities, a recent text writer deduces the principle, that, "unless there is some agreement to the contrary, preference shareholders are entitled to be paid their dividends to the amount guaranteed, before the other shareholders receive anything, so that if the profits, divisible at a given time, are not sufficient to pay the guaranteed dividends in full, the deficiency must be made good, out of the next divisible profits, the ordinary shareholders taking nothing until all arrears of guaranteed dividends have been paid to the preference shareholders."¶ The principle is certainly warranted by the terms used in creating and selling the stock, and it sustains what must have been, at the time, the reason-

* 3 Jurist (N. S.), 1183.

† Id., 1187; 1 De Gex & Jones, 606, 687

‡ 8 Rhode Island, 810;

§ See also *Crawford v. North-eastern Railway Co.*, 3 Jurist (N. S.), 1093; *Stevens v. South Devon Railway Co.*, 9 Hare, 815.

¶ 1 Lindlay on Part. (2d ed.), 781.

able expectations of both the parties. It is right and just, and ought to be maintained in the application made of it by the learned referee in the present case.

No reason exists for the objection, that the plaintiff has deprived himself of his right to have the net earnings applied to his payment of the dividends claimed in this action, by the acquiescence in their distribution among the general stockholders. For it appears by his own evidence, and is not contradicted by the defendants' witnesses, but found to be true by the referee, that the plaintiff protested against that disposition of the net earnings of the company, and demanded his dividends on his guaranteed stock. That, he stated, he was very particular to make each time.

When the action was commenced, the corporation existed precisely the same as it had done from the time when the consolidation was effected, in the year 1855. It was alleged that a further consolidation was contemplated, but it did not appear to have been consummated by anything shown in the case, until after the referee had made his report. For that reason, the proceedings up to that time, cannot be deemed unwarranted, by another consolidation, even if one actually took place before the report was in fact made. Up to that time, no evidence of its existence was given in the action.

The action was professedly brought by the plaintiff on his own behalf, and on that of the other owners of the preferred and guaranteed stock, having similar grounds of complaint. This was the proper form to be adopted, under the circumstances constituting the cause of it. The case of *Williston v. The Michigan Southern and Northern Indiana R. R. Co.** failed, because an action at law could not be maintained, and for the further reason that the courts of that State had no jurisdiction of an action against the defendant, in the present form, because it was a foreign corporation. And the same conclusion was declared, as to the impropriety of an action at law, in *Chase v. Vanderbilt and others*, by the Superior Court; but that such an action as the present one was proper, was conceded in the disposition which was made of *Williston's case*. The actions referred to in the English courts, were also brought in this form, and apparently assumed as free from objection in that respect. The same thing is maintained by Story's

* 13 Allen, 400.

Eq. Pleading; * also by *McKenzie v. L'Amoureux*, † *Bouton v. City of Brooklyn*, ‡ *Hammond v. Hudson River Iron and M. Co.* § and *Cady v. Conger*. | And the relief awarded by the report, is substantially the same as was decreed in *Henry v. Great Northern Railway Co.* (*supra*).

So far as the other owners of the guaranteed stock are concerned, the relief awarded, precisely conforms to the settled practice of courts of equity. The rule in these courts, is, that "the other creditors may come in under the decree and prove their debts before the master (now the referee), to whom the cause is referred, and obtain satisfaction of their demands, equally with the plaintiff in the suit, and under such circumstances they are treated as parties to the suit." ¶

The decision made in *Kilbourne v. Allyn*, by the General Term of the third department, is not in conflict with this practice, or the right, in a proper case, to maintain such an action. For the facts did not bring the case within the law relating to this class of actions. And if they had, the disposition made of it was entirely improper, for the relief had been awarded to other persons, without bringing them in under the judgment, and without any opportunity being afforded to them, or any desire being indicated by them, to become parties to the action, or to avail themselves of the benefit of the judgment recovered.

The objection that the stockholders should have been made parties to the action, appears to be untenable.**

No good reason seems to exist, for denying the plaintiff interest on the dividends he was entitled to receive, from the time the net earnings were appropriated to the holders of the common stock by the corporation. The earnings should have been first appropriated to the dividends on the guaranteed stock. That would have given its holders the indemnity for the loss, for which they are now to be compensated by interest. And they are entitled to interest for that purpose.††

* 7th ed., §§ 94-108. † 11 Barb., 516. ‡ 15 Id., 875. § 20 Id., 378.
| 19 N. Y., 256.

¶ Story's Eq. Plead. (*supra*), § 99, page 104; *Hallett v. Hallett*, 2 Paige, 15, 19

** *Thompson v. Erie Railway Co.*, 45 N. Y., 468.

†† *Adams v. Fort Plain Bank*, 36 N. Y., 255; *Dana v. Fiedler*, 2 Kernan, 41.

The judgment authorized by the report, will simply restrain the further misappropriation of the dividends to the common stock, until the arrears, with interest on the guaranteed stock, shall be paid out of the net earnings of the company. And, in that respect, it will be as favorable to the defendants, as they had any reason to require that it should be. Nothing less than what has been directed, would provide the owners of the guaranteed stock with the relief they were entitled to have awarded.

The order made after the referee's report, substituting the Lake Shore and Southern Michigan Railroad Company as the defendant, had no effect on the plaintiff's right to proceed with the action against the present defendants; for, before judgment was entered, it was reversed upon appeal, and that as effectually removed it from the case as though it never had in fact been made.

After the reversal of that order, an application was made upon the same and other papers, for leave to enter judgment upon the report of the referee, and to have a further reference, to bring in other parties in interest. The order was made, allowing judgment to be entered, and directing the reference applied for. From the plaintiff's own papers, however, it was shown that the Michigan Southern and Northern Indiana Railroad Company had previously consolidated with the Lake Shore and Buffalo and Erie Railroad Companies. This, it was stated and shown by the plaintiff, was done pursuant to laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois. But what those provisions were, was not in fact shown, beyond those contained in the law of this State, which, however, have no application to the obligations forming the plaintiff's cause of action in the present case. It must be assumed that the consolidation mentioned, was lawfully effected, for that is stated to be the fact, in the plaintiff's papers; and from them, it appears that the preceding corporations have merged in, and formed, one single corporation, owning and operating a line of railroad from Buffalo to Chicago. By this merger, the preceding corporations ceased to exist, according to the papers now before the court, on the appeal taken from the order; and all their property, franchises, rights and privileges, have become vested in the new corporation, formed by the final consolidation.

Although all the rights of creditors, and liens upon the property

of either of the corporations, were, by the terms of the consolidations, preserved unimpaired, that gave the plaintiff no power to proceed against either of the constituent corporations; for he is not a creditor, and had no lien upon the property of the corporation, within the meaning of these terms. They related to specific liens upon tangible property, and not mere equities, in the nature of charges upon earnings, like those existing in the plaintiff's favor. These were otherwise provided for, by the stipulation that all just debts, guaranties, liabilities and obligations, existing against either corporation at the time of the consolidation, should be assumed, provided for, paid and discharged by the consolidated company; and that all contracts and agreements between either of the companies and any person or persons, should be carried out by the new company.

The changes made, appear to have been sanctioned by the votes of the requisite number of stockholders, and to have been entirely lawful and proper; and they necessarily ended the existence of the constituent corporations, and the plaintiff's right to proceed to judgment against the one sued by him.

In order to avoid this result, the statutes themselves have been referred to, upon the present appeal from the order. But, notwithstanding the very general provision of the Code, prescribing the proof of the laws of other States, they cannot be considered by the court, because they were not read on the hearing, when the application for the order was made. If they provide for the continued existence of the old corporation, for the purpose of securing satisfaction of the demands against it, they should have been read, or otherwise brought to the notice of the court, when that application was heard. They cannot, for the first time, be read upon the hearing of an appeal from the order, which their provisions might have justified, if they had there been made to appear. A different rule was suggested as proper, in the case of *Cutler v. Wright*.* But it was not afterward approved or followed. On the contrary, it was held in *Hunt v. Johnson*,† that the laws of other States could not, for the first time, be read upon the hearing of an appeal. They are required to be produced before the court entertaining the original application. The consequence is, that no authority for pro-

* 23 N. Y., 472, 474.

† 44 N. Y., 27.

ceeding in the case against the preceding corporation, appears before the court. For that reason, as the corporation issuing the stock has ceased to exist, by merger in a new corporation, which has assumed all the obligations of its predecessors, the future proceedings should have been against the consolidated company. The order made on the application for leave to enter judgment, and for a reference under the judgment, was unauthorized, and it, as well as the judgment entered in pursuance of it, should be reversed, with costs. But, as the proofs made of the consolidation, simply affected the plaintiff's right to the order itself, and the proceedings had under it, the preceding proceedings in the action cannot be affected or disturbed by such reversal. An order should also be entered, denying the motion, but without prejudice to a renewal of it, upon further papers showing the continuance of the corporation, if that can be done, for the purposes of the action.

LAWRENCE and DONOHUE, JJ., concurred.

Ordered accordingly.

STEVEN DILLON, PLAINTIFF IN ERROR, v. THE PEOPLE,
DEFENDANTS IN ERROR.

Stolen property — identity of — presumption arising from possession of — statement of prisoner as to how he obtained possession — when must be proved false by prosecuting officer.

The plaintiff in error was convicted of grand larceny, for stealing a quantity of pig-iron. The agent to whom the iron was sent to be sold, testified that it bore the marks, and presented the appearance, of the iron in his possession, some of which had been taken away from the premises where it was deposited, and some from a boat, having a portion of it on board, during the night, in the early morning of which the defendant was arrested. He further testified that he identified the iron when he saw it in the following afternoon. *Held*, that his testimony, together with the fact that the iron was found in the defendant's boat, upon the river, at half-past three o'clock in the morning, and his subsequent statement that he had purchased it of a canal boat captain for fifteen dollars, when it was really worth fifty-two dollars, were sufficient to justify the submission of the identity of the property to the jury.

The defendant's counsel requested the court to charge the jury, that the mere possession of the property stolen, was not *prima facie* evidence of the commission of the larceny by the defendant. The court declined so to charge. *Held*, no error. That the request must have been designed to relate to the defendant's possession, as that had been shown by the evidence, and that such possession was so recent and so suspicious, that it was consistent with no other rational conclusion than that of guilt.

The defendant's counsel requested the court to charge that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, the prosecution was required to show the account to be false. The court declined so to charge. *Held*, no error. That the rule only applied to those cases in which considerable time has elapsed between the taking of the property and the discovery of the fact of possession, and where a reasonable account of how the prisoner came by the property was given to those finding him in possession; and that the account, given by the defendant as to the manner in which he obtained possession of the iron, was, under the circumstances of the case, entirely unworthy of belief.

WRIT of error to the Court of General Sessions of the city of New York, to review the conviction of the plaintiff in error of the crime of grand larceny in stealing a quantity of pig-iron.

The facts are stated in the opinion.

Peter Mitchell, for the plaintiff in error.

Benj. K. Phelps, District Attorney, for the defendants in error.

DANIELS, J.:

The defendant, Steven Dillon, was convicted of the crime of grand larceny, in the Court of General Sessions, and sentenced to be imprisoned in the State prison, for the term of five years. Exceptions were taken in his behalf, to the charge given the jury, and to refusals on the part of the learned recorder, to charge as requested by the defendant's counsel. After judgment, a writ of error was issued, for the purpose of securing a review of such exceptions. The first was taken to the refusal of the court to take the case from the jury, on the ground that the description of the identity of the property, was too indefinite, vague and uncertain, to convict the defendant upon, and not sufficient in law to be submitted to the jury.

The property charged to have been stolen, was twenty-eight bars

of pig-iron. And the evidence of the agent having it in charge, and who was the sole agent here at the time for its sale, was, that it bore the marks, and presented the appearance, of the iron in his possession, some of which, he testified, had been taken away from the premises where it was deposited, and from a boat having a portion of it on board, during the night, in the early morning of which the defendant was arrested. His testimony was, that he did identify the iron, when he saw it early in the following afternoon, by its marks and looks. This, with the fact that it was found in the defendant's boat upon the river, at half-past three o'clock in the morning, and his subsequent statement that it was bought of a canal boat captain for fifteen dollars, when the uncontradicted evidence was that its value was about fifty-two dollars, were sufficient to justify the submission of the question of the identity of the property to the jury. The case in this respect, was entirely different from the authority relied upon by the defendant's counsel in support of this objection.* The proof in that case did not show that the property, found in the defendant's possession, had been stolen at all, and the witness who was alleged to be its owner, could not identify it, so as to distinguish it from the same kind of property sold to his customers residing in the same vicinity as the prisoner. While, in the present case, the evidence of the agent showed that a larceny of the iron had been probably committed; that the quantity taken was similar to that found in the prisoner's possession; that it had the marks and appearance of the iron in the agent's custody; and that no other iron of that description, was, at the time, probably on deposit, or for sale in the vicinity. The proof was sufficient to render it the duty of the court to submit the identity of the property to the jury.

The comments of the court on the evidence given by the same witness, that, on being shown the iron the next day, he recognized it beyond any doubt, as being the property which had been taken away from his possession, was also excepted to. No request for its modification in any respect, was made on the part of the defendant. And it is certainly true, that the statement made, was fully as strong as the evidence of the witness would justify. He did not, in words, say that he recognized the property as his beyond

* *State v. Furlong*, 19 Maine, 235.

any doubt, but it is not difficult to perceive that he intended as much as that by the statement which he made. He testified that he did identify the iron as that which he was sure he saw, the night before, on the boat at his dock. That he had received it about a week before, and knew it by its being new iron, the color of the sand used by the company that manufactured it, the shape of the pigs, and the letters upon it. That he would be pretty certain about it, without the letters, but not as certain as with them. The fair inference from his statements, was, that the iron, found with the defendant, was a part of that sent to him for sale, and which had been carried away during the preceding night. And no reason exists for supposing that he entertained the least doubt as to the correctness of his statements. They were made with a sufficient degree of positiveness, to justify the comment made upon them by the learned recorder.

The defendant's counsel requested the court to charge the jury, that the mere possession of the property stolen, was not *prima facie* evidence of the commission of the larceny by the defendant. This the court refused to do, and the defendant's counsel excepted. The request must, of course, have been designed and understood to relate to the defendant's possession, as that had been shown by the evidence given in the course of the trial. There was no dispute as to the facts constituting that portion of the case. The larceny appeared to have been committed sometime during the night, and the property was found by the police, in the possession of the defendant and another person with him, in a small boat managed by them, at half after three o'clock in the morning. The possession, at that unseasonable hour for lawful traffic, was, within the authorities, sufficient to maintain the presumption of the defendant's criminal agency in procuring it. It was so recent, and so suspicious, that it was consistent with no other rational conclusion, than that of guilt. "Generally, wherever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent upon that other, to prove how he came by it; otherwise the presumption is that he obtained it feloniously."* This was cited with approbation, in the case of the *State v. Furlong* (*supra*), and its accuracy as a general

*2 East's Crim. Law, 656.

legal proposition, is sustained by the decision made in the case of *Knickerbocker v. The People*.*

As the proposition was first stated by the court, concerning the presumption arising from the fact of recent possession of stolen property, it was rather too decided against the defendant. For it is a presumption of fact; one which the jury may act upon, and not one which by law they are required to follow. But it was afterward qualified, and submitted to the jury in that form. The court, upon that subject, responded to the request of the defendant's counsel, that it was presumptive evidence, and further charged, that stolen property, immediately afterward found in possession of a party, afforded the presumption that the person having the possession, had stolen it. The case was finally submitted to the jury upon that proposition, and it was as favorable to his case as the defendant had any legal right to require.

The court also declined to charge the proposition, presented by the defendants' counsel, that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, the prosecutor was required to show the account to be false. That may be true, as to a large class of cases where considerable time has elapsed between the taking and the discovery of the fact of possession, but, to bring the case, upon this point, within the rule relied upon by the defendants' counsel, as it is stated in the authority cited by him, it is necessary that it should appear that a reasonable account of how the possessor came by the property, should be given to those finding him in possession.† In the present case, nothing of that kind was done. For, according to the evidence of the policeman who made the arrest, the defendant gave no account of his possession, until he and the other person arrested were at the police court, sometime after the arrest had been made. The defendant himself swore that he told the policeman, at the time of the arrest, that he had bought the iron. When or where he claimed to have bought it, he did not state that he disclosed. What he said he stated himself, gave no reasonable account of the manner in which he obtained possession of the iron, and, under the circumstances attending his detection and arrest, it was wholly unworthy of belief. Even if the proposition, as the court was requested to charge

* 43 N. Y., 177.

† *Regina v. Crowhurst*, 1 Car. & Kir., 370.

it, had been accurate, it was not raised by the evidence given in the case. Beyond that, the prosecutor cannot be required to show that the defendant's statements are false, when given in exculpation of what seems to be a guilty possession, as long as the circumstances attending it, are such as to indicate that they are not true. The question is one for the jury, who would ordinarily acquit on the faith of them, where they appeared to be probable, but would reject them under circumstances throwing grave suspicions upon their truth. No arbitrary, unbending rule exists upon this subject, applicable to all cases of possession of stolen property. What the law requires, is, that the defendant's statement should be credited where it appears to be probable, and consistent with the facts. While, on the other hand, the jury is not only at liberty, but it is their duty to decline to adopt and act upon it when it is inconsistent with other facts proved, tending to establish guilt, and it is suspicious and improbable in itself. There is nothing in the case, from which the defendant's conviction can be held to have been improper, and the judgment should therefore be affirmed.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed.

THE DUTCHESS COUNTY INSURANCE COMPANY,
RESPONDENT, v. ALBERT HACHFIELD AND OTHERS, APPEL-
LANTS.

Bonds — when negotiable — Stolen — rights of bona fide purchaser of.

Bonds were issued by the city of Poughkeepsie, payable "to the said ——— his executors, administrators and assigns." *Held*, That these terms, following the space left for the insertion of the name of the payee or holder, were sufficient to render them negotiable.

This action was brought to recover five of these bonds which had been feloniously stolen from the plaintiff, their lawful owner, shortly before they were purchased by the defendants. At the trial, the defendant's counsel requested the court to charge, that if "Hachfield & Co., purchased these bonds in the open market for full value, and in the usual course of business, without notice or suspicion, they were not bound to make a close and critical examination in order to escape the imputation of bad faith in the purchase." The court declined so to charge, and left it to the jury to say how much of an examination they were to

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make. *Held*, that this was error, and that, as it was not cured by the charge which was still more unfavorable to the defendant, that the judgment should be reversed, and a new trial granted.*

APPEAL from a judgment in favor of the plaintiff, and from an order denying a motion made on the judge's minutes for a new trial.

The facts are stated in the opinion.

Coles Morris and *Michael H. Cardozo*, for the appellants.

Albert Stickney, for the respondent.

DANIELS, J. :

This action was brought to recover the possession of five bonds, issued by the city of Poughkeepsie, for the sum of \$1,000 each. They were payable in blank, with the addition, following the blank, of the terms, "his executors, administrators, or assignees," etc. And these terms, following the space left for the insertion of the name of the payee or holder, were sufficient to render them negotiable, under the mercantile law of the State, as it now seems to be settled.†

The evidence showed that these bonds had been feloniously stolen from the plaintiff, their lawful owner, shortly before they were purchased by the defendants. And that imposed the obligation upon them, of proving, to the satisfaction of the jury, that their purchase was made for value, and in good faith, before they could establish a title to the bonds, superior to that of the plaintiff as the preceding owner. ‡ Where fraud or illegality in the negotiation of commercial paper is shown, the law presumes a want of consideration in the transfer. It supposes that "the original party not being able to sue upon the instrument himself, has handed

* As to what must be proved to defeat the title of the purchaser of stolen negotiable bonds, see *Seybell v. The Nat. Currency Bank*, 54 N. Y., 288; S. C. 2 Daly, 383.—Rep.]

† *Brainerd v. N. Y. & Harlem R. R. Co.*, 25 N. Y., 496; *White v. Vermont Mass. R. R. Co.*, 21 How. (U. S.), 575; *Michigan Bank v. Eldred*, 9 Wallace, 551-552.

‡ *Farmers' Bank v. Noxon*, 45 N. Y., 762.

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over to another, to sue upon it for his benefit. This presumption, so raised by the law, must be rebutted by the holder, showing affirmatively that he gave value. It is not quite correct to say that the *onus* of proving value, is cast upon the plaintiff; but the plaintiff being presumed to stand in the shoes of the party from whom he took the instrument, and to be his agent for the purpose of carrying out the fraudulent or illegal intention, is bound to get rid of that presumption." *

Proof was given by the defendants, tending to overcome the presumption, arising out of the circumstance that the stolen bonds were found in their possession, by showing that they were purchased by them for a valuable and adequate consideration, without notice of any infirmity in the title of their vendor. And it is upon the disposition, which the court made at the trial of the questions arising upon this proof, that the main effort is made by defendants' counsel, to sustain their present appeal.

After the charge had been delivered to the jury, the defendants' counsel requested the court to instruct them, that if "Hachfield & Co. purchased these bonds in the open market, for full value, and in the usual course of business, without notice or suspicion, they were not bound to make a close and critical examination, in order to escape the imputation of bad faith in the purchase." The court declined to charge this proposition, and left it to the jury to say how much of an examination they were to make; and the defendants excepted to the refusal. This exception is the only one required to be considered in connection with the charge of the court, because the preceding request, though in the main correct, was finally coupled with an untenable proposition, and, for that reason, properly refused. The proposition presented by this exception seems to be faultless. For, if the defendants did, as it contemplated, purchase the bonds in the open market for value, in the usual course of business, without notice or suspicion, then they were not bound to make either a close or critical examination, either of the bonds, or into their history, in order to escape the imputation of bad faith in the purchase. The terms made use of, did not complete or finish the idea pointed at by the words notice or suspicion; but as the whole controversy hinged upon the ques-

* Fitch v. Jones, 32 Eng. Law and Eq., 184, 137, 138.

tion whether the defendants' purchase was made in good faith, what was really intended by their use, was clear and conspicuous. It was, in substance, without notice or suspicion of the robbery, by which the plaintiff was divested of their possession. That was, under the circumstances, their clear implication; and, with that construction, the proposition which the court declined to charge, was sound in all respects. For it presented the case of a purchase for full value, in the ordinary course of business, without notice or suspicion of the robbery creating the infirmity of title. And that was all which the law required to be established, to protect the defendants as the owners of the bonds. Under those circumstances, if they had been submitted to, and found as proved by the jury, the defendants were not bound to make any examination or investigation whatever, to escape the imputation of bad faith in their purchase of the bonds. For they were of themselves sufficient to show a purchase in good faith, for value, and in the usual course of business. And the law requires no more than that, in order to vest the buyer with the title to negotiable securities.*

There was nothing in the charge, which avoided the effect of the refusal to submit this proposition to the jury. That was still more unfavorable to the defendants' title. For it required them to satisfy the jury, that the bonds were purchased by them in the ordinary course of business, "and that they did not procure them in such a shape as would put a prudent man upon inquiry;" and that "they bought them and paid for them, without reason to suppose that there was anything wrong about them." "That where parties *act in good faith*, in the purchase of securities, in the open market, without any attending circumstances which would call for inquiry, or put a party upon his guard, the purchaser would be protected," etc. And it was further added: "If you find from the evidence and the surrounding circumstances, that Hachfield & Co. bought these bonds in good faith, without any reason to suppose that Kendrick had wrongfully come into possession of them, then they are protected." These were the prominent portions of the charge, stating what the defendants were required to establish, in order to succeed in their defense. And they

* *Welch v. Sage*, 47 N. Y., 148; *Belmont Branch of State Bank of Ohio v. Hoge*, 35 N. Y., 65.

required too much of them, because it was clearly to be implied from what was said, that a purchase for value, and in good faith, was insufficient, in case there was enough shown to put the defendants upon inquiry, or upon their guard; or arouse their suspicions that the seller had wrongfully acquired possession of the bonds; while all that the law requires to protect the purchaser, is, that the purchase shall be for value, in good faith, and in the ordinary course of trade. * And these propositions were not corrected by the general statement, afterward made, that the defendants were to be protected if they bought the bonds in good faith, because the preceding qualifications of the general proposition were in no sense withdrawn or restricted. The jury were left with the impression, conveyed by the charge, that, in addition to good faith in the purchase and value paid for the securities, the defendants were bound to satisfy them, that it was made under circumstances that would not put a prudent man upon inquiry, or cause him to suppose there was anything wrong, or put him upon his guard, or lead him to suppose that the bonds were not regular. To correct these qualifications, at least, the proposition the court declined to charge, was required. And its refusal must have been decisive with the jury, that a purchase for value, in good faith, and in the usual course of business, was not in itself sufficient for the protection of the defendants.

A new trial cannot be ordered for misdirection in the charge, for the simple reason that it is not one of the grounds which, under the Code, can be considered, in support of a motion made for that purpose upon the minutes of the court.† For that reason, the effect of these directions is no otherwise before the court on the present appeals, than they are appropriate for consideration upon the effect of the refusal to charge as requested by the defendants. In that respect, they have been examined, to show that the proposition declined, was not included in anything which had been said. And, as it had not previously been submitted to the jury, and was right and proper for their consideration, the court should have charged it, when the request was made. The refusal to do so was

* *Welch v. Sage, supra*; *Goodman v. Simonds*, 20 How. (U. S.), 343.

† Code, § 264.

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error, and, for that reason, the judgment should be reversed, and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed, and new trial ordered, costs to abide the event.

THE FIRST NATIONAL BANK OF NEW YORK, RESPONDENT, v. THEODORE W. MORRIS AND ANOTHER, APPELLANTS.

Accommodation draft accepted to be used in another State—when usurious—Sureties of corporation—usury cannot be pleaded by.

The Lenox Glass Company, a corporation residing and doing business in the State of Massachusetts, drew a draft on the firm of D. S. Schank & Sons, of which the defendants are members, which firm then resided and carried on business in the city of New York. The draft was accepted by the firm for the accommodation of the drawer, and subsequently discounted by it in Massachusetts, at a rate which was, according to the laws of New York, usurious.

The draft was subsequently transferred to the plaintiff, which brought this action thereon. *Held*, that it was entitled to recover; that the defendants, by accepting the draft for the accommodation of the drawer, became simply sureties for its payment, and hence neither they, nor their principal, the corporation, could, under the laws of this State, interpose usury, as a defense in an action upon the draft.

Sensible, that by the acceptance of the draft for the accommodation of the drawer, the inference would seem to be natural and proper, that it must have been intended that the drawer could use it in any manner which might be lawful at the place of its residence, and that the fact of its being discounted at a rate, lawful there, but usurious here, would not affect its validity.

Jewell v. Wright (30 N. Y., 259) criticised and doubted; *Bank of Georgia v. Levin* (45 Barb., 340) and *Bowen v. Bradley* (9 Abb. [N. S.], 395) approved.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this cause by the court without a jury. The facts are stated in the opinion

Wm. A. Beach and A. C. Brown, for the appellants. The draft was usurious. (*Lee v. Selleck*, 33 N. Y., 615; *Curtis v. Leavitt*, 15 id., 227; *Jewell v. Wright*, 30 id., 259; *Cope v. Alden*, 53 Barb., 350.)

Charles A. Peabody, for the respondents, cited *Balme v. Wombough* (38 Barb., 352); *Hyde v. Goodnow* (3 N. Y., 266); *Merchants' Bank v. Spalding* (12 Barb., 302); *Chapman v. Robertson* (6 Paige, 627); *Miller v. Tiffany* (1 Wallace, 298).

DANIELS, J.:

The judgment in this action was for the recovery of the amount due upon a draft, drawn by the Lenox Glass Company, in Massachusetts, on the firm of D. S. Schank & Sons, then residing and carrying on business at the city of New York, and accepted by them, for the accommodation of the drawer. The defendants were members of that firm, and defended the action on the ground that the drawer of the draft procured it to be discounted for its benefit, at what, under the laws of this State, was a usurious rate of interest. But the draft was discounted by a banking institution in the State of Massachusetts, at a rate of interest which, by the laws of that State, was legal and valid; and that institution transferred it to the plaintiff. The point in the case is, whether the defense of usury was, under the circumstances, sustained.

By the acceptance of the draft for the accommodation of the drawer, the inference would seem to be natural and proper, that it must have been intended that the drawer could use it in any manner which might be lawful at the place of its residence; for, without that privilege, it is obvious that the drawer could not be secured the full benefit of the paper accepted. Its business was in another State, and the presumption would be, that the acceptance was procured to be used where that was transacted, and its ordinary corporate functions were exercised; and from such a design, a valid use of the paper there, ought to be maintained by the courts of this State. The usury laws of this State were in no way in force there, and, properly speaking, had no relation to the use there made of the paper. It was accepted to be used by the drawer, carrying on its corporate operations there, and no restriction imposed as to what should be done with it. The drawer was entitled to make any lawful use which it could of the acceptance,* and one mode of making such use of it, was, to render it available for the drawer's benefit, in any way in which that could be done consist

* *Seneca Co. Bank v. Neass*, 3 Com., 448.

ently with the laws of the place, under which, as a corporation, it existed. But it is claimed in behalf of the appellants, that the right of the drawer to use the acceptance, was subject to the disability imposed by the usury laws of this State, because the acceptance was made in this State, and by its terms rendered the bill payable here; and the decision made in the case of *Jewell v. Wright*,* is a direct authority in favor of the correctness of that position. Under ordinary circumstances, it would be the plain duty of this court to follow that authority, while it remained apparently in force, although differing from the propriety of the conclusion maintained by it. But, since it was made, the learned justice who prepared the opinion upon which the case was decided, has, with the concurrence of his associates at General Term, silently disregarded its authority.† The same thing was done upon a full consideration of the case, by the Superior Court of Buffalo, at General Term.‡ The doctrine on which the case stood, was there fully examined by the late Judge MASTEN, with his accustomed learning and ability, with the result that it was opposed to the preceding authorities on the subject, and probably decided under a clear misapprehension. When that case was decided, Judge DAVIES prepared an adverse opinion, characterized by his usual thoroughness, learning and ability, in which he maintained the principle, since acted upon in this court and the Superior Court of Buffalo, under the preceding authorities applicable to it. This opinion is published in a note to *Bowen v. Bradley*,§ and is entitled to consideration and weight in the disposition of this case. Still, it may well be doubted whether a proper sense of decorum is consistent with the position that the decision in *Jewell v. Wright*, as long as it has not been overruled by the court pronouncing it, can properly be disregarded by this court.

But as the defendants, now complaining of the judgment, accepted the draft for the accommodation of the drawer, they became simply surêties for its payment.¶ The drawer appears to have been a corporation, and as such could not defend an action upon the draft drawn by it, on the ground of usury, under the laws

* 30 N. Y., 259.

† *Bank of Georgia v. Lewin*, 45 Barb., 340.

‡ *Bowen v. Bradley*, 9 Abb. (N. S.), 395.

§ 9 Abb. (N. S.), 400.

¶ *Pitts v. Congdon*, 2 Com., 352, 354.

of this State; and the same disability affected the defendants as its sureties. *

The judgment appealed from was right, and it should be affirmed:

DAVIS, P. J., concurred.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENTS, v. THOMAS C. CHALMERS, IMPLEADED, ETC., APPELLANT.

Chapter 348, Laws 1860 — bond given by assignee under — sureties on — liability of.

The defendants are sureties upon a bond given by one De Camp, in pursuance of chapter 348, Laws 1860, for the faithful discharge of his duties as assignee, under an assignment made by insolvent debtors for the benefit of their creditors. Certain judgment-creditors of the assignors subsequently brought suits, in which judgments were recovered setting aside the assignment as to them on the ground of fraud, and directing the assignee to pay over to them certain sums in said judgments mentioned. The assignee having failed to comply with the terms of the judgments, this suit was brought. *Held*, that the defendants were not liable. The object of the bond required by the statute is to render general assignments by insolvent debtors more efficient, and to secure the full and faithful application of the debtors' property to the discharge of the creditors' demands, according to the directions contained in the assignment, and it is no part of the design of the statute to defeat the assignment, or to provide means, or secure the ends, by which that might be accomplished.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

On October 31, 1865, Mary A. Halsey and Oscar P. Northum, comprising the firm of Halsey & Northum, of the city of New York, executed and delivered to A. L. De Camp, a general assignment for the benefit of their creditors. On November 14th, 1865, the defendants in this action executed a bond to

* *Rosa v. Butterfield*, 33 N. Y., 665; *Belmont Branch Bank v. Hoge*, 35 id., 56

the people of the State of New York, in the penalty of \$25,000, pursuant to section 3, chapter 348, Laws of 1860, conditioned for the faithful discharge of the duties of said De Camp as such assignee, and for the due accounting for all money received by him as such assignee. Certain creditors of Halsey & Northum subsequently commenced suits, in which judgments were recovered, setting aside the assignment as fraudulent as to them, and directing that the property in the hands of the assignee should be applied toward the payment of such judgments. On the foot of these decrees, setting aside the assignment, an order of reference was made on the 4th of March, 1871, referring it to a referee to take the accounts of De Camp, as assignee, and report the amount of property which came into his hands for which he was liable. The referee found that he was chargeable with \$15,402.29, and De Camp having failed to pay over this amount, as directed by the court, this action was brought against the sureties on the bond.

F. N. Bangs, for the appellant, cited *Douglass v. Howard* (24 Wend., 35); *Jackson v. Griswold* (4 Hill, 522); *McMicken v. Webb* (6 How. [U. S.], 292); *McClusky v. Cromwell* (1 Kern., 598); *Shellington v. Howland* (53 N. Y., 374); *Smith v. The U. S.* (2 Wall., 236).

Nelson Smith and *B. K. Phelps*, for the respondents, cited *Henriques v. Hone* (2 Edw. Ch., 119); *Mackie v. Cairns* (5 Cow., 547); *Rapelye v. Prince* (4 Hill, 119); *Bridgeport Ins. Co. v. Wilson* (34 N. Y., 275); *Methodist Churches v. Barker* (18 id., 463); *Leavitt v. Dabney* (9 Abb. [N. S.], 373); *Gelston v. Hoyt* (13 Johns., 561); *Dorr v. Birge* (8 Bar., 351); *Wood v. Young* (5 Wend., 620).

DANIELS, J.:

This action is upon a bond, given by the defendants under chapter 348, of the Laws of 1860, for the faithful discharge, by the principal, of his duties as assignee, under an assignment made by insolvent debtors for the benefit of their creditors, and for the due accounting for all moneys received by such assignee. That is the form prescribed by the statute for the condition of the bond, and it strictly

conformed to the requirement in that respect made. The assignee accepted, but never consummated or completed, the execution of the trusts created by the assignment; for creditors of the insolvent assignors, who were dissatisfied with the disposition which the assignment made of the debtor's property and its proceeds, assailed it as fraudulent, under judgments recovered by them, and that was finally held to be its character. And for that reason, it was held inoperative and void, as to their demands. This effectually subverted and annulled the entire assignment, and wholly defeated the objects proposed to be accomplished by it, because the amount due upon the judgments under which it was assailed, greatly exceeded all that the assignee received under it for the purposes of the trust, And that was diverted from the trusts mentioned in the assignment. and appropriated to the payment, as far as it might prove sufficient for that purpose, of the creditors' judgments against the assignors, and the costs of the proceedings taken by them. This necessarily ended all the rights, duties and functions of the assignee, under the assignment. His duties, afterward, wholly appertained to the application to be made of the property, in conformity to the judgments. From that time, they became his guide, and defined the duties he could be required to perform. They resulted in finding the debtor's property in his possession, applicable to the payment of the judgment creditors' demands, and his only obligation was to appropriate it as they required him to do that. In that he has failed, and, on account of that failure, the present action was brought against the assignee and his sureties upon the bond given for the faithful discharge of his duties, and the due accounting for the moneys received by him. And the first, as well as the most important question arising upon the present appeal, is, whether that failure was a violation of the condition of the bond. That was answered at the circuit in the affirmative, and the sureties of the assignee were accordingly held liable for his failure to comply with the terms of the creditors' judgments. In no other way could their liability be maintained, for it is only where the assignee fails, or refuses to perform the decree or order made against him, that an action can be brought upon the bond.*

The bond was given pursuant to a statutory requirement, and

* Laws of 1860, 596, § 5.

the liability of the sureties in it, can, consequently, be no broader than the purposes designed to be promoted by the terms and spirit of the statute. To that extent, the sureties are clearly bound, but no farther than that. And for the purpose of determining the measure of their liability, an examination of the spirit, design and terms of the statute, will become necessary. Its main object and purpose appears to have been, to render general assignments by insolvent debtors, more efficient and certain, in the execution of the design for which the common law permitted them to be made, and to secure the full and faithful application of the debtor's property, to the discharge of the creditors' demands, according to the directions contained in the assignment. It was no part of the design of the statute to defeat the assignment, or to provide means, or secure the ends, by which that might be accomplished. Neither did it provide or interpose any obstacle, not previously existing, in the way of creditors, dissatisfied with its provisions, disposed to assail it and attempt its subversion. Their remedies remained precisely as the law had before provided them. They were in no respect accelerated, diminished or affected by this statute. Its general scope and object was to secure a faithful application of the debtor's assets, under the terms and provisions of the assignment, and in that way to protect both debtors and creditors against the waste, improvidence, negligence and infidelity of the assignee, in the execution of the trusts created by it. To promote that end, the statute begins by providing for certain formalities to be observed in the execution of the assignment, denominating the assignee's estate a trust, and requiring a schedule of the debtor's property to be made and filed under the solemnity of his oath. And then follows the requirement, that the assignee shall, with sufficient sureties to be approved by the county judge, enter into a bond, of the nature of that given in this instance, "before he shall have power or authority, to sell, dispose of, or convert to the purposes of the trust, any of the assigned property." And after the lapse of one year, upon the petition of any creditor of the assignors, the assignee may be required to show cause before the county judge, why an account of the trust fund, created by the assignment, should not be made. And that officer, on the hearing, is authorized to decree payment of such creditor's proportional part

of such fund. This provision is an important one to be considered in this case, because it is for the default of the assignee to comply with what may be required from him by the order or decree which may be made, that his sureties are rendered liable. And it is apparent that it is directed only to the proper application of the trust fund, according to the terms of the assignment. No judgment is rendered necessary, to warrant the proceedings of the creditor, as it is where the object is to assail the assignment as *unlawful*, and subvert and destroy its trusts. But all that is necessary is, that the creditor shall be entitled to a proportional part of the trust fund, provided by it for his benefit. And this necessarily assumes the validity of the assignment itself, for in no other way, consistently with the terms used, could the creditor be entitled to a proportional part of the fund mentioned. The remedy is clearly provided for, and confined to, those creditors claiming a benefit under the terms of the assignment itself.* And that design is still further exhibited by the provisions made, concerning the action which may be brought upon the bond. For it is only when the assignee shall omit, or refuse, to perform any decree or order made against him, for the payment of a debt out of the trust fund, by a judge or court having jurisdiction, that the bond can be ordered to be prosecuted. The default for which that can be done, is limited to the non-performance of the decree or order requiring payment to be made out of the trust fund, provided for, and contemplated by the assignment. And it clearly presupposes the continuance and execution of the trusts mentioned in it. This purpose is still further manifested by the disposition which the court or judge is required to make of the amount collected on the bond. For the only use which, according to the terms used in the act, can lawfully be made of that, is, that it shall be applied in satisfaction of the debts of the debtor, "in the same manner as the same ought to have been applied by" the assignee; and that is, as it was directed by the assignment. For, under all proceedings provided for by the statute, no obligations are considered beyond those arising out of that instrument.† They are all prescribed for the apparent and only purpose of securing a faithful

* Laws of 1860, 596, § 4.

† Id., p. 596.

execution of the trusts declared by the assignment. It is for their sole protection that the bond was prescribed; and to render that entirely efficient, the proceedings mentioned were provided. The terms in which the condition of the bond is required to be expressed, sustain the same result; for they require the sureties to become bound only for the faithful discharge of the duties of the assignee, and the due accounting for all moneys received by him. The duties referred to, are no other than those arising out of the assignment, and the moneys simply those received by him as assignee, in the ordinary course of the execution of such trusts.

The object and design of the statute in providing the bond, are reasonably clear and well defined; and it is the duty of the court to carry them into effect, as they are manifested by the law. * It cannot, properly, be so far enlarged by construction, as to impose upon the sureties an obligation which it was not its purpose to require them to bear; particularly, as neither the law nor the terms of the bond, contain anything which requires that to be done. Sureties are favored by the general rules of construction, so far that their undertaking on behalf of their principal, is not to be extended beyond the fair and obvious import of the terms, under the circumstances, made use of for the purpose of expressing it. † Their undertaking, by the bond in suit, was, that the assignee should faithfully discharge the duties devolving upon him in that capacity, and account for the moneys received by him in the same relation. They in no sense became liable for his duties and omissions in the new capacity, arising out of the complete subversion of the assignment and all the trusts it contemplated and provided for, by the action of creditors proceeding in hostility to it, and in defiance of its provisions. Consequently, the omission or refusal to perform the decree or order, for which alone an action may be maintained upon the bond, under the terms of the statute providing for it, was not shown upon the trial of this cause. The contingency, on which the liability has been rendered dependent, never has arisen, and no judgment against the sureties was warranted by what appeared in the case. For this reason, the other objections to the recovery will

* *Holmes v. Carley*, 31 N. Y., 289, 290, and cases cited.

† *Martin v. Thomas*, 24 How. (U. S.), 315, 317.

not require consideration. The judgment should be reversed, and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed, and new trial ordered, costs to abide the event.

HERMAN BACHARACH AND JOSEPH ROSENTHAL,
RESPONDENTS, v. ALFRED E. LAGRAVE, IMPEADED, ETC.,
APPELLANT.

JAMES B. ADRIANCE AND OTHERS, RESPONDENTS, v. ALFRED
E. LAGRAVE, IMPEADED, ETC., APPELLANT.

*Extradition treaty—surrender of fugitive from justice under—rights of—not liable
to arrest in a civil action.*

The defendant, who had been brought into the United States as a fugitive from justice, under the extradition treaty with France, was arrested in a civil action. After such arrest, he gave bail and was discharged. *Held*, that by so doing, he did not waive his right to apply to the court to have the order of arrest vacated, on the ground that he was not, under the circumstances, liable to be arrested in such action.

Petrie v. Fitzgerald (1 Daly, 401) distinguished; *Williams v. Bacon* (10 Wend., 636), doubted.

Where a fugitive from justice is surrendered under an extradition treaty, it is for the single and special purpose of being tried for the crime, mentioned in the proceedings taken against him, and for none other. As to all other matters, he is entitled to the protection of the laws of the country surrendering him, so far as his personal liberty would have been secured by them, in case no removal of his person had been made. And, after the purposes of justice are satisfied, as to the particular offense for which he was surrendered, he is entitled to return to the country from which he was taken.

A person who has been surrendered under an extradition treaty, is not, while in the custody of the government to which he has been delivered up, and for a reasonable time thereafter, subject to be arrested in a civil action.

APPEALS from orders of the Special Term, denying motions to set aside orders of arrest.

The defendant was brought into the United States as a fugitive from justice, under the extradition treaty existing between this country and France. Upon his arrival in New York, a number of

his creditors commenced actions against him, in which they obtained orders of arrest. Lagrave then applied to have these orders of arrest set aside, on the ground that he was unlawfully brought into this country, the crime for which he was surrendered not being provided for in the treaty, and that his creditors had unlawfully conspired together to bring him here, in order that they might arrest him in civil actions to be commenced by them. His motion was granted, and the orders were set aside. The case is reported in 14 Abbott (N. S.), 333, and 45 Howard, 301, the opinion being delivered by Mr. Justice FANCHER, where the facts of the case are fully stated. Subsequently, the plaintiffs in the above entitled actions, who were in no way concerned in bringing Lagrave into this country, commenced these actions, and in them obtained orders of arrest. The defendant then moved to set aside these orders, and the motions were denied. The decision at Special Term is reported in 15 Abbott (N. S.), page 275, and in 47 Howard, page 73, LAWRENCE, J., delivering the opinion.

From these orders the defendant appealed.

Charles W. Brooke, for the appellant.

D. M. Porter and *L. A. Gould*, for the respondents.

DANIELS, J.:

The defendant applied to have the order for his arrest vacated, because he had been brought into the United States, as a fugitive from justice, under the extradition treaty existing between this country and France. He was arrested under the order before he could return to France, and while he was still in custody. After such arrest, he gave bail on the criminal charge, and in that manner secured his discharge. This circumstance is now relied upon, by way of answer to his application, as a waiver of his right to the relief asked for. And many authorities are cited by the plaintiffs' counsel, holding that an appearance in the action, even though informal, will be attended with the effect of waiving irregularities in the means made use of to bring the defendant into court. That principle, as a general proposition, is very well settled, but it does not follow from it, that the defendant's application should be denied for that reason.

What he particularly complains of now, is not the means or process by which he was brought into court, but the restraint imposed upon his person by the order of arrest. And among all the authorities relied upon, but one in any way affects the consideration of that point, and that is the case of *Petrie v. Fitzgerald*.^{*} In that, it was held that a party, arrested on the way from court, which he had attended as such, waived his right to be discharged, on the ground of his privilege, by giving bail in the action. This was held by the court, as the result justified by the authorities, although very well considered cases were referred to, inconsistent with that view. And the conclusion was sustained, because the order was not assailed, but the arrest made under its authority, at a time when it could not be enforced.[†]

In the present case, the order is assailed not simply on the ground of a mere privilege, but because of the implied guaranty, afforded by the treaty, that the defendant should be freely allowed to return to the country from whence he was brought, in pursuance of its provisions, for the sole and only purpose of being tried upon a specified criminal offense. Such a claim, it was held in the case of *Williams v. Bacon*,[‡] was not within the rule privileging suitors and witnesses from arrest whilst going to, attending at, and returning from, court. And while the application, then made for the discharge of the order and the arrest under it, was denied, it was not done because the right had been in any way jeopardized or lost by the proceedings taken in the case.

The provision of the Code upon this subject, is comprehended in very general terms. It allows a party arrested on an order, to apply on motion to vacate the order of arrest at any time before judgment, and even after that, where the arrest may be made less than twenty days before its recovery. § These provisions contain no restriction, as to the ground on which the application may be made, and the right secured by them is in no way rendered dependent upon the circumstance, that no appearance may have previously been made in the action by the applicant. Neither do they discriminate in any respect, as to the grounds on which the discharge of the order may be applied for. The remedy is general in its nature, sufficiently so to include the protection of every possible

^{*} 1 Daly, 401.[†] Id., 407.[‡] 10 Wend., 636.

§ Code, §§ 204, 188.

right, the defendant may be able to show in favor of his exoneration from the proceeding taken to arrest him. And, under its general nature, the motion may be made and maintained, whenever it can be successfully shown that no right to the order and arrest, under the circumstances, existed, after bail has been given, even though that may not be done in support of a mere personal privilege. Modern legislation in this State has been repeatedly changed for the purpose of facilitating the right of arrested parties to secure their discharge on bail; and afterward, also, by motion, where the right of arrest can be shown not to exist. And it is the duty of the courts to place no needless obstacle in the way of parties applying for the benefit of the provisions made in their favor, but to maintain and apply them in the spirit that has led to their enactment. Under these provisions, no reason is apparent for including one case within them, and excluding another from them, where the party arrested can show a positive right to be set at liberty. They were enacted for the purpose of protecting persons in the complete enjoyment of that right, when its existence can be satisfactorily maintained, without discrimination as to the peculiar reason on which it may appear to depend. Whether this should extend so far as to include the protection of a mere personal privilege, after bail has been given, and a discharge secured in that manner, it is not designed at this time to decide. But where the law has secured an absolute right to exemption from arrest, the case is manifestly different, and within the protection of the provisions of the Code, allowing the motion to be made after bail has been given.

The objection must therefore be considered and disposed of, which has been presented in the defendant's behalf: whether an order for his arrest was proper, under the circumstances shown in support of the present application. It may be properly assumed, in the disposition of it, that he was a fugitive from justice, residing in the French Republic, and only amenable to the laws of this State, by force of the extradition remedy provided for by the treaty. Without the provision made, he could not have been brought here from that country. And that provided that it could be done only in a prescribed and particularly enumerated class of cases. The effect of such a specification, according to well settled

principles of construction, is, to exclude the remedy from all but the enumerated cases. As to those not mentioned, the negative is as effectually implied, as though it had been expressly delared.

For that reason, when the defendant was extradited, it was for the purpose of answering the crime mentioned in the proceedings taken against him, and for no other purpose whatsoever. As to all other matters, being beyond the reach of the laws of this State, he was absolutely entitled to his freedom. He was extradited for a single special purpose, that of being tried for the crime, for the commission of which he was removed from the protection of the laws of France. Beyond that, he was entitled to the protection of those laws, so far as his personal liberty would have been secured by them, in case no removal of his person had been made. In the language of the treaty, he was delivered "up to justice" because he was accused of one of the crimes which it enumerated.* And it was implied in his surrender, that he should be at liberty to return again to France, when the purposes of justice had been performed in the charge made against him. The nature of the treaty, as well as good faith with the foreign power entering into it, will permit of no other construction. That power consented, by the provision made, to surrender the person, entitled in all other respects to its protection, for trial and punishment, on a particularly specified charge; and for no other end or object whatsoever. Without the provision made, he could not be extradited at all, and by that, it can only be done for a clearly defined object. And it therefore becomes the duty of the power, to which the surrender may be made, faithfully to secure its proper observance. For some purposes, that has been expressly provided by the act of congress, requiring the president to take all necessary measures for the protection of the extradited person against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant, and until his final discharge from custody or imprisonment, for or on account of such crimes or offenses, and for a reasonable time thereafter.† It is true, that this provision does not, in terms, include the present case, for it only extends to acts of lawless violence, but it is cogent evidence of the spirit of

* Vol. 8, U. S. Statutes at Large, 582, art. 1; id., 617.

† Vol. 15, U. S. Statutes at Large, 337, § 1.

the obligation, resting upon the public authorities, to restrict the restraint imposed simply to the crime charged and mentioned in the treaty. The obligation is no greater to protect the party from lawless violence, than it is to protect him from all other detentions of his person. After the purposes of justice are satisfied, as to the particular offense for which the party may be surrendered, then his right to return again to the protection of the laws he was deprived of for the single object allowed by the treaty, is clear and absolute.

A different construction would involve consequences which no State, having authority to protect its citizens or subjects, would be willing to submit to; for it would allow embarrassments and hardships, that it could not be contemplated, the authorities receiving them should be at liberty to inflict upon them. If the extradited person can be subjected to any farther restraint, than may appropriately appertain to the offense for which, under the terms of the treaty, he may be removed, he may be indicted and tried on criminal charges for which no surrender of his person could lawfully be required; and if that could be done, political offenders, seeking refuge in one country, could be returned on other charges, and then subjected to trial on accusations of that character, contrary to the policy of all civilized countries. Our own citizens are deeply interested in maintaining a construction of treaty stipulations, which will be sure to avoid such abuses. And if a detention and trial for another offense would not be proper, it would seem to be clear that an arrest of the person at the private suit of another, must be denied by the same principle. It is a consequence arising out of the implication that, as to all but the extraditable offense, the accused shall enjoy the unrestrained liberty of returning to the country, from which he was taken by force of the treaty provisions. Any different construction would be entirely unreasonable, and no enlightened nation would be willing to submit to it. It would be an abuse of the power provided for, allowing extradition only for clearly defined and particularly enumerated charges; and, by necessary implication, limiting it to those charges. If the power of detention and restraint is extended beyond them, then there is no obvious limit to which it cannot be carried; and a person brought into the country, under the treaty for one purpose, may be detained

here indefinitely for an entirely different purpose. No people are more interested in denying such a latitude of oppression than our own; for, otherwise, our citizens could be forcibly taken abroad upon one charge, and detained there, on the abandonment of that, upon others for which their extradition would never be consented to or allowed.

The principle in the case is an important one, and it necessarily grows out of the treaty stipulations made with other countries. They are part of the supreme law of the State, superior to those of its own enactment, by an express provision of the Constitution of the United States.* And it is the duty of the courts to maintain its observance. That cannot be done by allowing extradited persons to be arrested and restrained at the suits of private persons, unless they elect to remain in the country after their discharge from the proceedings provided for by the treaty. Until such election, the person is entitled to his full liberty, for the purpose of regaining his former habitation; and an arrest in a private action is entirely inconsistent with the preservation and enjoyment of that right. Process, in no way interfering with that privilege, may be properly sustained; but certainly, nothing going beyond that.

The case of *Williams v. Bacon*, † arising under the Constitution and laws of the United States, relating to the removal of offenders from one State to another, may not harmonize with the views here expressed. If it does not, then it must be regarded as unsound, as it may very well be. Certainly, no other principle than that securing immunity from arrest for causes not provided for by the treaty, can either fairly or reasonably be deduced from its purposes and provisions. And if this authority is inconsistent with that idea, then it should not be regarded as binding.

The order appealed from in this case, and that in the suit of *Adriance and others*, argued with it, must be reversed, with ten dollars costs in each appeal, and orders entered, setting aside the orders of arrest, etc.

DAVIS, P. J., and BRADY, J., concurred.

Orders reversed in each case, with ten dollars costs.

* U. S. Const., art. 6, § 2.

† 10 Wend., 836.

WILLIAM L. BOYD, EXECUTOR, ETC., OF CAROLINE C. DE LA MONTAGNIE, APPELLANT, v. JOHN DE LA MONTAGNIE, RESPONDENT.

Husband and wife — Contract between — when set aside because of false representations.

A transfer of property, made by a wife to her husband because of representations that a debt, in reality due by the husband, could be enforced against and collected out of such property, when such was not the fact, will be set aside by a court of equity.

An act done or contract made under a mistake, or in ignorance of a material fact, is avoidable and relievable in equity.

APPEAL from a judgment in favor of defendant.

The action was brought to set aside a transfer of a Sailor's Snug Harbor lease of property in the city of New York, made by the plaintiff's intestate to her husband, the defendant, as alleged and proved on the trial, because of misrepresentations made by defendant, as to the liability of the intestate for certain debts, and for the purpose of relieving this property from the payment thereof.

Aug. F. Smith, for the appellant, insisted, that in transactions between husband and wife, a court of equity will throw the burden upon the person benefited, of showing perfect fairness and honesty. (Taylor on Ev., vol. 1., 6th ed., § 129; *Grigby v. Cox*, 1 Ves., Sr., 517; *Hoghton v. Hoghton*, 15 Beav., 278.) A fraudulent concealment is a sufficient ground for avoiding a conveyance. (*Whelan v. Whelan*, 3 Cow., 537, 576, 577; *Summers v. Griffiths*, 35 Beav., 27.) A misapprehension will work an avoidance. (*Gee v. Spencer*, 1 Vernon, 32; *Young v. Peachy*, 2 Atkyn, 255; 1 *Story Eq. Jur.*, §§ 307, 308.) In case of gift, donee should be able to show that it was voluntary. (*Cooke v. Lamotte*, 15 Beav., 234, 239, 241.) That the conveyance was in fraud of creditors, would not be an answer to a claim by a wife upon her husband for a retransfer; the parties are not upon an equal footing. (*Fredlove v. Cole*, 41 Barb., 318; affirmed, 41 N. Y., 619; *Ford v. Harrington*, 16 N. Y., 285; *Osborne v. Williams*, 18 Ves., 379).

E. W. Stoughton, for the respondent.

DANIELS, J. :

This action was brought by Caroline De La Montagnie, the defendant's wife, to annul the assignments, made of a leasehold estate by her to A. Oakey Hall, and from him to the defendant. She intermarried with the defendant in December, 1847, and they lived together as husband and wife until the year 1860. No formal separation then, or afterward, took place, but it is plain, from the evidence, that the preceding ardor of his affection for his wife, after that time very sensibly declined, until the present action was commenced, in 1867. Since that time, their relations were hostile and unfriendly, up to the time of her decease, which occurred after the recovery of the judgment and taking the appeal in this action. According to her letters, forming a portion of the case, she continued to regard the defendant with affection and esteem, up to the year 1866. On the 23d day of September, 1851, the assignments of the leasehold estate were executed, which it was the primary object of this action to annul and set aside.

After that time, the lease was renewed to the defendant, and he has received and enjoyed the rents and profits of the premises, ever since the assignments were made. They were each made for the nominal consideration of one dollar, and constituted a gift of the estate by the wife to her husband.

The learned judge, presiding at the trial, found that the gift proceeded from the love and affection which she entertained for her husband. But the statement that such was the consideration, either wholly or partially, the evidence showed, and the judge found, was omitted from the assignments by the express direction of the wife herself.

Before the assignments were made, the relations existing between herself and her husband were very affectionate and confiding in their character, and there is nothing in the evidence from which it can be inferred that there was the least simulation, in that respect, on the part of the husband. It was claimed that the subsequent subsidence of his affection, warranted, and, indeed, required such an inference. But as that seems to have happened quite a number of years after the assignments of the estate, no such conclusion can properly be drawn from that circumstance. There is nothing in the case, involving the genuineness of his affection for her in doubt,

at the time when the estate was assigned, or for several years after that time. Before the assignments of the leasehold estate, she made a will, devising that estate to her husband, and then designed he should receive it in that way. And both her own evidence, and that given by the defendant, as witnesses in the case, contain no indication that she intended he should become the recipient of the estate, in any other way, until near the time when the assignments were made. And if no change had been produced, through the agency of the defendant, in her intentions, there is no reason for supposing that he would ever have received the title to the estate in any other way. For that reason, it is probable that their subsequent estrangement would have deprived him of the estate altogether, if his only chance of receiving it had been confined to the will of his wife. For, after such an event, she not only probably would, but actually did, change her will, so as to give what property she had the power to dispose of, an entirely different direction. It may therefore be safely and properly assumed, that if the husband had not received the estate as he did, that he probably would never have received it at all. For no other circumstance arose after the assignments were made, from which it can be inferred that she would have voluntarily parted with it, in his favor. And she seems to have been restrained by fear of the censure of her friends, from disposing of it in his favor, during the period of her life, without the existence of some cogent reason requiring that to be done. They had opposed her marriage, and, as the defendant was nearly twenty years younger than herself, they seem to have suspected that her property was the motive leading to it, upon the part of the defendant. And she seemed anxious to avoid what might confirm the propriety of that suspicion. It is highly probable, therefore, that the defendant never would have received the title to the estate, if that had not been acquired by means of the assignments. For that reason, the validity of his title must depend upon the circumstance, whether they can be equitably maintained against the claim which was made to the estate by his wife. The evidence showed, and the judge found the fact as proved, that in May, 1850, the defendant, while in the State of California, bought two shares in the steamer, called Gold Hunter, and paid the purchase-price, partly by money sent him by

his wife, and partly by money supplied by himself. The contract of purchase was taken in his own name, and for his own account, but the title, so far as it was taken, was transferred in the name of his wife. By August of that year, the adventure in which the steamer was engaged, proved to be a failure, and debts existed against the persons engaged in it, to a considerable amount. But the defendant's wife was not liable for their payment, either directly, or by means of their being chargeable upon the property owned by her. The defendant, however, exhibited a letter to her, from his brother, who thought an attempt would be made to collect the debts from her, and containing the expression of apprehension upon that subject. And the defendant himself also expressed his opinion or apprehension to her, that she and her property were liable for the payment of those debts. These seem to have been her only sources of information upon the subject of the liability of herself and her property for the payment of those debts, and, from what was communicated to her in that manner, she believed that herself and her property were liable for the payment of such debts, and that if she assigned the lease to the defendant, it would be more secure in his hands than her own, and might at least delay the creditors; and she executed the assignment made by her, under that belief. That conviction seems to have changed her purpose as to the time of transferring the lease, and induced her to do so, by means of the assignments, instead of leaving her purpose, that her husband should ultimately have the lease, dependent upon the provision made by her will. These facts are sustained by the evidence, and in substance were found by the judge, before whom the trial was had. Besides that, in 1860, she asked the defendant for a reassignment of the lease, or to assign her the renewal of the term taken by him, and he promised to comply with the request, but stated that he would take his own time for it. This circumstance is not entirely consistent with the conclusion, that, by the transfer, it was designed that the defendant should become the absolute owner of the estate. For, if that had been the intention, he would have insisted upon his title, instead of promising the surrender, or return of it again to his wife. But it is not necessary in the disposition of the case, to determine which conclusion is the most probable. For, it very clearly appears that she was induced



to part with the title to the estate, by means of the conviction produced in her mind by the representations made to her, that both herself and her property were liable for the debts contracted in the adventure of the "Gold Hunter," and that by making the assignments, she hoped to delay and embarrass the creditors, and perhaps save her property. This purpose was not expressed to the counsel who drew the assignments, and it was not necessary that it should be, as long as its existence, and the representations producing it, so clearly appear from the evidence of the parties themselves. And both have been found as facts by the judge. These representations were untrue, and they produced a false impression in the mind of the wife, inducing her to part with an estate, which she would have otherwise continued to own, until after all disposition to bestow it upon the defendant had ceased to exist; and that, under the well settled principles of equity, was sufficient to render the assignment invalid, both upon the ground of mistake, and fraud. The general rules upon that subject, are, that "an act done, or contract made, under a mistake or ignorance of a material fact, is voidable and relievable in equity." * "The fact may be unknown to both parties, or it may be known to one party and unknown to the other. In the latter case, it will sometimes afford a solid ground for relief as where it operates as a surprise or fraud, upon the other party. But in all such cases, the ground of relief is not the mistake or ignorance of material facts alone, but the unconscientious advantage taken of the party by the concealment of them." †

It was not found that the defendant knew the representations, made by him to his wife, to be untrue. But where such a relation exists, as did between these parties, that is not necessary to constitute a fraud, which courts of equity will relieve parties from the consequences of. For, in equity, fraud may be committed by "acts, omissions and concealments, which involve a breach of legal or equitable duty, trust or confidence, justly reposed, which are injurious to another, or by which an undue and unconscientious advantage is taken of another." ‡ Where the relations of attorney and client, guardian and ward, principal and agent, husband and wife, and other similar confidential cases, exist, "the law, in order to prevent undue advantage, from the unlimited confidence, affection, or sense of duty, which

* 1 Story's Equity, 9th ed., § 140.

† Id., § 147

‡ Id., § 187.

the relation naturally creates, requires the utmost degree of good faith in all transactions between the parties. If there is *any misrepresentation*, or any concealment of a material fact, or any just suspicion of artifice, or undue influence, courts of equity will interpose, and pronounce the transaction void, and, as far as possible, restore the parties to their original rights." *

The facts proved and found, clearly bring the present case within these principles, and, from the confidential relations existing between the parties at the time, entitled the wife to be relieved from the consequences of the transfer made by her of her estate, although a leading motive inducing it, was improper and unlawful. She acted under the influence of the misrepresentations made to her by, and through the agency of, the defendant, as her husband. And as she then confided fully in his statements, it was perfectly natural that she should yield her property to what was then regarded as the only chance of its safety. The law will not permit him to profit by an apparent advantage secured in that way, because it regards her, under the circumstances shown, as acting under his controlling and governing influence. Under this presumption, a client has been relieved from the effect of his act, in transferring his property to his attorney, in order to avoid the claims of his creditors. And that was done, for the reason that the relation existing between the parties, required the application of the general equitable principles already mentioned.† The present case is within the spirit of that authority. Instead of being denied relief, the facts proved required that judgment should be pronounced in favor of the wife. The statute of limitations was not applicable to the case, because of the coverture of the plaintiff, and the continued absence of the defendant from the State. No facts were found, and the evidence proved none, rendering that defense a proper one. The judgment should be reversed, and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and BRADY, J. concurred.

Judgment reversed, and a new trial ordered, with costs to abide the event.

* 1 Story's Eq. (9th ed.), § 218; *Sears v. Shafer*, 2 Seld., 268, 272; *Jaquès v. Methodist Church, etc.*, 17 Johns., 548; *Fry v. Fry*, 7 Paige, 461.

† *Ford v. Harrington*, 16 N. Y., 285.

THE CHATHAM NATIONAL BANK OF THE CITY OF
NEW YORK, RESPONDENT, v. THE MERCHANTS' NA-
TIONAL BANK OF WEST VIRGINIA, APPELLANT.

Act of 1789, sec. 12, 1 U. S. Statutes at Large, page 79 — residence of National Bank within the meaning of — "Entering of an appearance" of defendant — what constitutes — Motion papers — defects in copies disregarded, when they do not exist in originals.

A national bank, organized under the acts of congress, is a resident of the State in which it is located and does business, within the meaning of the act of 1789, authorizing the removal of causes into the United States courts.

The plaintiff's attorneys opposed a motion, made by the defendant, for the removal of this cause into the United States court, on account of certain defects in the copies of the papers served upon them. *Held*, that as the defects did not exist in the papers themselves, on which the application was made, that they were properly disregarded.

On the 15th of December, 1873, a notice of the defendant's appearance in this action was served upon the plaintiff's attorneys. *Held*, that the mere notice of an appearance was not the *entering of an appearance* required by the act of congress, nor a sufficient compliance with Rule 7 of this court.

The petition, filed by the defendant for the removal of the cause, contained the statement that it then entered its appearance and had not done so before; and the order requiring the plaintiff to show cause why the application should not be granted, recited the fact that the defendant, on the day of its date, had entered its appearance; *held*, that these statements sufficiently showed an entry of appearance, and that, even if they did not, procuring the order and making the motion, were equivalent to the entry of an appearance within the technical meaning of the term. (BRADY, J., dissenting.)

APPEAL from an order made at the Special Term, denying a motion made by the defendant to remove the cause into the Circuit Court of the United States. The facts are stated in the opinion.

William H. Scott, for the appellant, cited *Stevens v. Phoenix Ins. Co.* (41 N. Y., 149); *Barney v. Globe Bank* (2 Am. L. Reg. [N. S.], 221; *Field v. Blair* (1 Code Rep. [N. S.], 292); *Ex parte Isaacs* (12 Wend., 193); *Norton v. Hayes* (4 Den., 245).

B. F. Watson, for the respondent, cited *Ayres v. Western R. R. Co.* (32 How., 351); *Bowen v. First Nat. Bank* (34 How., 408); *Manufac. Nat. Bank of Chicago v. Baack* (40 How., 409).

DANIELS, J.: •

The sworn petition of the defendant stated that the plaintiff was a corporation or banking association, created and existing under and by laws of the State of New York and of the United States, located and doing business at the city of New York, in the State of New York, and at the time of bringing the suit, was and is still a citizen of the State of New York. This was not denied on the part of the plaintiff, and should, for that reason, be accepted as the truth; and, as such, it was sufficient to present a case within the act of congress, providing for the removal of causes into the Circuit Court of the United States, so far as the right depended upon that circumstance.

It is claimed, however, that the name by which the plaintiff has been incorporated, indicates it to be an association formed for banking purposes under the laws of the United States, providing for the creation and circulation of a national currency; and that circumstance, added to the fact stated in the petition, that it is a corporation or banking association, created and existing under the laws of the United States as well as of this State, sufficiently warrants that conclusion.

But that does not divest the defendant of the right to insist upon the removal of the cause into the Circuit Court of the United States, even though it may have been withheld, where each of the parties to the action is shown to be a foreign corporation.* These associations have been held liable to the attachment laws of this State, although existing and transacting their business within its boundaries, because the remedy they provide for, includes such associations, on account of the circumstance of their creation under the laws of another government than that of the State.† But that does not justify the conclusion, that they are foreign corporations within the ordinary signification of those terms. That certainly cannot properly be said to be their character; for, when they are organized and located within this State, they are as completely citizens of the State, within the signification of the act of congress, providing for the removal of causes into the Circuit Court, as though they were incorporated exclusively under its laws.

* *Ayres v. Western Railroad Co.*, 48 Barb., 132.

† *Bowen v. First National Bank of Medina*, 34 How., 408.

The act of congress upon this subject, constitutes, under the Constitution of the United States, a portion of the laws of the State, paramount even to those enacted by its own Legislature. It exists through, and extends over, the State, as completely and entirely as any legislation can by possibility do; and it is a portion of the positive law, required to be observed and maintained by all its citizens and inhabitants. When an association for banking purposes is formed within the boundaries of the State, for the purpose of being located and transacting business within its limits, it necessarily becomes an inhabitant of the State. This is clearly implied by the provision of the act requiring the certificate, under which the association may be formed, to state the place where its operations of discount and deposit are to be carried on; designating not only the State, territory or district, but the particular county or city, town or village.* Besides that, the names and residences of the shareholders are also required to be stated; and the general power is conferred upon it, of suing and being sued in any court of law and equity, as fully as natural persons; and its usual business is required to be transacted at an office, or banking-house, located in the place stated in its organization certificate.† The association, when formed, has no other residence or domicile, than that designated, under the provisions of the act, in the certificate; and that substantially and effectually renders it a corporation of the State, within which it may be located, formed under that portion of its laws, which, under the Constitution, have been enacted for its inhabitants by the general government. As such, it is to be presumed, under the construction given to the act of congress providing for the removal of causes, to be created and formed by citizens of the State in which it may exist, and for that reason to be a citizen of the State within the meaning of that act.‡ The act of congress, of July 27, 1868, does not deprive the defendant, although itself a banking association, organized under the United States banking laws, of the right to insist upon the removal of the cause. That act provides for the removal of actions, brought against corporations, organized under a law of the United States, or any of their

* 18 U. S. Statutes at Large, 101, § 6, sub. 2. † Id., § 6, sub. 3; also, § 8.

‡ Louisville, etc., Railroad Co. v. Letson, 2 How. (U. S.), 497; Stevens v. Phoenix Ins. Co., 41 N. Y., 149, and cases referred to in the opinion.

members, in a new class of cases, not within the other provisions of congressional legislation on this subject. And it permits that to be done when the defendant states in the petition that a defense exists, arising under or by virtue of the Constitution, or any treaty, or law of the United States. From this privilege, banking associations, organized under the laws of the United States, are excluded by an exception contained in the act.* But the exception, by its terms, extends no farther than the subject-matter of the act in which it is contained, and, consequently, can have no effect upon the provision made for the removal of causes in other cases by the preceding law. It simply left these associations unaffected by its provisions, and entitled to the privileges provided in this respect for suitors by other acts of congress; and among them, the right of removing the action into the Circuit Court of the United States, when the circumstances of the case appear to be such as are required to justify that proceeding. By the act under which the application was made in this case, the petition was required to be filed at the time of entering the defendant's appearance in the action;† and that, it was claimed, was not done. Other objections of a mere formal nature were relied upon by way of answer to the application. They were predicated upon defects in the copies of the papers served upon the plaintiff's attorneys; but as they did not exist in the papers themselves on which the application was made, they were very properly disregarded upon the hearing. The more substantial objection was placed upon the circumstance, that a notice of the defendant's appearance was served, in the action, on the 15th of December, 1873, while the petition itself was not presented until the seventh of the following January; and, for that reason, the court denied the application for the removal of the cause, holding that the appearance was entered, within the meaning of the terms used in the law, at the time when the notice itself was served.

But this was a mistaken view of the provision requiring the petition for the removal of the cause to be filed at the time of entering the defendant's appearance; for the mere notice of appearance was not the entering of an appearance required by the act of congress

* 15 U. S. Statutes at Large, 226, 227. † 1 U. S. Statutes at Large, 79, § 12.

That, by Rule 7 * of this court, is something more than the mere service of a notice. It contemplates an act to be performed on the filing of the notice with proof of its service. Upon that being done, the rule authorizes the defendant's appearance to be entered as of the time when the notice itself was served.

The notice was simply a notice of the defendant's appearance, without an entry of it, and was no more than the notice of retainer, which, under the preceding practice, the defendant was authorized to serve in the action, which was held insufficient to constitute the entry of appearance required by the act of congress, providing for the removal of causes into the United States Circuit Court, on the ground on which the right is claimed in this action. †

No other act appeared to have been performed on the part of the defendant, before the filing of the petition, from which it could be claimed that an appearance of the defendant had been entered; while the petition contained the statement, that it then entered its appearance, and had not done so before. And the order requiring the plaintiff to show cause why the application should not be granted, recited the fact that the defendant, on the day of its date, had entered its appearance, and at the same time filed its petition for the removal of the cause, and offered the security required by the act, by a bond then filed. And, as there was no contradiction of this statement, it should be accepted as true, as long as the mere service of the notice was not the entry of an appearance. ‡ No appearance appeared, by the papers, to have been previously entered; and this statement, as well as the other to the same effect contained in the petition, sufficiently showed its entry at the time when the order was made, to constitute a performance of what the act of congress required to be done in that respect. But, if it did not, procuring the order and making the motion were equivalent to the entry of an appearance, within the technical meaning of those terms; for by such acts the defendant, of necessity, appears in court. They could not be performed without an appearance in court, as well as an appearance in the action. This was substantially held in the case of *Ayres v. Western Railroad*

† Norton v. Hayes, 4 Denio, 245.

‡ Porter v. Bronson, 29 How., 222.

* This is Rule 14 of the rules adopted Dec. 20, 1870.—[REK.]

Company;* where, obtaining an order extending the time to answer, was considered to be the entry of an appearance, and, for that reason, sufficient to justify the denial of a motion, afterward made for the removal of the cause.† The provisions of the act of congress were complied with in all other particulars, and an order should therefore have been directed for the removal of the cause.

The order appealed from should be reversed, with costs, and an order entered, directing the removal of the cause into the Circuit Court of the United States.

BRADY, J. (dissenting):

The twelfth section of the judiciary act, which relates to the removal of causes from the State to the federal courts, provides, that if the defendant, among other things to be made apparent, shall, at the time of entering his appearance in such State court, file a petition, etc., it shall then be the duty of the State court to accept the surety, and proceed no further in the cause. The right of removal, however, is purely statutory, and when the defendant attempts to exercise it, he must show that he has complied with the law in its requirements. He must, at the time of entering his appearance, which is the first step, file his petition; and the question which is suggested *in limine*, on this appeal, is, whether the defendants' appearance was entered in this action, in the manner provided by the rules and practice of this court. It is not pretended that anything more was done on that subject, than the service of a notice of retainer on behalf of the defendants, and the presentation of the petition, containing a statement that the petitioners do now enter their appearance in this action, but have not done so before. The notice of retainer, however, was not claimed by the defendants to be an appearance. The defendants aver their appearance when the petition was signed or presented, and not before. It is not pretended, either that any rule was entered by the defendant on the subject, either on their own behalf, or by the plaintiffs' attorney, under Rule 14 of this court. The appearance of the defendants was not entered, therefore, when the peti-

* 48 Barb., 132.

† See, also, *Cooley v. Lawrence*, 12 How. P. R., 176.

tion was presented.* In *Bristol v. Chapman*, the defendant went into court at Special Term, and caused his appearance to be entered in the minutes of the court. The appearance was held to be irregular. The court said, MORGAN, J., delivering the opinion: "The rules of this court have prescribed the manner in which the defendants may appear, and what shall be deemed an appearance. This is by service of notice of retainer, on filing which, the defendant may, doubtless, enter his appearance in the clerk's office, and at the same time file his petition." In *Norton v. Hayes*, it was held that notice of retainer was not entering his appearance, within the terms or meaning of the act of congress, but that entering an appearance with the clerk, at the time of filing the petition, was a compliance; and BEARDSLEY, J., said: "These being done at one and the same time, the application for the removal was made in due season." The case of *Redmond v. Russell* (*supra*), was cited by him to sustain the proposition just stated. In the latter case, SPENCER, J., said: "This is not a case in which the comity of the court is to be exercised; if this defendant is not strictly entitled to have his cause removed, we are bound to maintain our jurisdiction. The plaintiff has as strong a claim to have his cause retained here, as the defendant can have to remove it. The whole question turns upon the point, when did the defendant enter his appearance?" The court declared that the entering an appearance, and filing the petition, are to be simultaneous acts. In *Durand v. Collins*, it was held that the execution of an undertaking upon arrest, was not, in theory or in fact, an act done in court. That the party's appearing by the filing of special or common bail, which prevailed prior to the Code, had no application to proceedings under the Code, and that no appearance was formally or actually entered in the action, until the defendant entered his appearance with the clerk of the court, which he had done at the time he filed his petition to remove the cause. In *Cooley v. Lawrence*, the question, what is an appearance in a State court, is considered somewhat elaborately, and it is said that what is held in such court to be a submission to its authority in the

* *Redmond v. Russell*, 13 Johns. Rep., 153; *Norton v. Hayes*, 4 Denio, 245; *Bristol v. Chapman*, 84 How. Pr. Rep., 141; *Field v. Blair*, 1 Code R. (N. S.), 292; *Durand v. Hollins*, 8 Duer, 686; *Cooley v. Lawrence*, 5 Duer, 605. See also 8 Abbott Pr. Rep., 305, note.

cause, whether coerced or voluntary, must be deemed an appearance; and further, when such submission has once been made, it cannot be retracted. The appearance of the defendant in that case, was declared perfected by his submission to the court of a material question upon affidavits and argument, namely, the continuance of an injunction against him. The result of these considerations, is, that in order to enable a defendant to remove his case from this court to the federal court, he must enter his appearance according to the rules and practice of the court, and, at the same time file, or at least present, his petition. The defendants, not having entered such an appearance, were not regular in their proceeding to remove the cause; and the motion in the court below was properly decided. If the defendants claimed that the service of a notice of retainer was an appearance within the act of congress, under the practice which prevails in this court, then their application was too late, as it was not made until several days after such notice was served. They make no such claim; they insist, on the contrary, as already suggested, that it was not an appearance, and rely, therefore, on the incident of the proceeding to remove, indicated by the statement, "they now enter their appearance," contained in their petition. The petition was not, nor was anything contained in it, an appearance such as contemplated, nor did it amount to an appearance. It was of no greater significance than the service of a notice of retainer, which, for the general purposes of an action, is, under our Code, a sufficient appearance; or of the execution of an undertaking, which, as we have seen, is not an appearance. It was not *entering an appearance*, either in theory or in fact, and was in form a proceeding unknown, and, by analogy to the case of *Bristol v. Chapman*,* *irregular*. It follows, therefore, that the defendants' proceedings were premature, and the order made at special term should be affirmed.

DAVIS, P. J., concurred with DANIELS, J.

Order reversed, with costs, and order entered removing the cause into the Circuit Court.

* *Supra*.

JOHN G. C. TADDIKEN, RESPONDENT, v. MARY A.
CANTRELL, APPELLANT.

MARY McVEY, RESPONDENT, v. MARY A. CANTRELL,
APPELLANT.

Attachment — granted at time of issuing the summons — Effect of omission to procure order for publication of summons or personal service thereof within thirty days.

Where an attachment was granted against the property of the defendant, as a non-resident, at the time of issuing the summons, and no order of publication was obtained within thirty days thereafter, and the defendant was not personally served with the summons during said period, *held*, that the attachment was thereby invalidated, and should be set aside.

Waffle v. Goble (58 Barb., 517) followed.

APPEALS from orders of the Special Term, denying motions to set aside attachments issued in these cases, and continuing the same in force.

The facts in each of these cases are the same. In each of them, an attachment was granted on the ground that the defendant was a non-resident of this State. The moving papers were, in each case, the summons, bearing date June 2d, 1874, an affidavit of the same date, and the usual undertaking. The attachments were granted on the thirteenth of January. The summonses and attachments were placed in the sheriff's hands on the twenty-seventh. No personal service of the summons was made. On the twenty-sixth of February, an order directing the publication of the summons was obtained. The defendant moved to set aside the attachments under an order to show cause. On the seventh of March, these motions were heard, and orders granted setting aside the attachments. On the twenty-fifth of March, the plaintiffs procured orders to show cause why the motions should not be reheard; and on April first, orders were made vacating and setting aside the orders of March seventh, and restoring the attachments. From these orders the defendant appealed.

Beardslee & Cole, for the appellant.

William G. McCrea, for the respondents.

BRADY, J.:

The order of publication, in this case, was not obtained within thirty days after the attachment was granted, and no personal service during that period was made upon the defendant. The effect of that omission was to invalidate the attachment, and it should have been discharged on motion. The point has been decided.* In the case of *Kerr v. Mount*,† it was determined that, in order to warrant the granting of an attachment, an action must be depending; and that the issuing of a summons against a non-resident defendant, was not, within the statute, the commencement of an action. The Code, section 227, was subsequently amended, and it was declared that, for the purposes of the section, an action should be deemed commenced when the summons was issued, "provided, however, that personal service of such summons shall be made, or publication thereof commenced within thirty days." It was upon due consideration of the effect of this amendment, that *Waffle v. Goble*,‡ was decided. The process of attachment issues upon the presumption that the defendant has property, which may be seized to secure the payment of the debt alleged to be due. It is in its nature a proceeding *in rem*. It is also to be presumed, when it is applied for, that the property of the defendant is then within reach of the process of the court whose aid is invoked, and that it will be given out to the proper officer for execution. It often happens that perishable property is seized, and that merchandise is taken, which, though not perishable, is of such a character as to require immediate care to prevent its destruction. It also happens that property is seized, which is injured by removal, and storage in places, sometimes not well adapted to its character. It was in view of these things, of the harsh nature of the proceeding, and of the justice of at once setting in motion the means to be employed of advising the defendant of the seizure of his property, and of preventing the plaintiff from holding the process until such time as he might think proper to place it in the hands of the sheriff, that the legislature imposed upon the plaintiff the duty of effecting personal service, or commencing publication, within thirty days; and if it had been limited to ten days, it would perhaps have been a better provision. If the proposition be that the plaintiff, after

* *Waffle v. Goble*, 53 Barb. Rep., 517. † 28 N. Y. Rep., 659. ‡ *Supra*.

obtaining the attachment, may retain it and issue it when he chooses to do so, then he may keep it for an indefinite period, and, it might be, issue it when the defendant, by a change of domicile, had become a resident of this State. Such a course, however, is not within either the letter or the spirit of the statute. The action is commenced when the summons is issued, and upon it the attachment rests; provided, however, that within thirty days from the day of granting the attachment, the defendant is personally served with the summons, or its publication is commenced. This is within the letter and the spirit of the statute, and the provision was designed to prevent the abuse of the writ, and the injustice which delays might occasion when it was granted.

The orders made at Special Term should be reversed.

DAVIS, P. J., and DANIELS, J., concurred.

Orders reversed.

MEMORANDA

OF

CASES NOT REPORTED IN FULL.

ISAAC N. DEVOE, RESPONDENT, *v.* DAVID R. NUTTER,
APPELLANT.

Referee's report — motion to set aside.

Two actions were pending between the same parties, one in the Court of Common Pleas, and the other, the present action, in this court, both of which were referred to the same referee. An order was made by the referee that the issues in the action in the Common Pleas should be tried first, and that if they were decided against the defendant, that then an accounting should be had to determine the amount due.

The actions were tried before the referee who, subsequently filed his report, and directed that judgment be entered for the plaintiff in the action in this court. The defendant applied to have the report set aside, claiming that he had been misled, that he understood the order to apply to both actions, and that he had therefore failed to introduce proof as he had intended to do at the proper time, to reduce the amount of plaintiff's demand. The motion was denied. Upon appeal to the General Term, *held*, that its denial was error. That as it appeared that defendant had been misled, that an order should be entered vacating the report so far as it related to the amount of the recovery, and directing the referee to proceed to try and determine the question as to the amount plaintiff is entitled to recover.

APPEAL from an order made at the Special Term, denying a motion made by the defendant, to set aside the report of a referee.

Mudgett & Nutter, for the appellant.

W. L. Flagg, for the respondent.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Order reversed.

GIBBONS L. KELTY AND OTHERS, RESPONDENTS, v. SARAH
A. LONG, APPELLANT.

Married woman — Separate estate of — when debt is contracted for benefit of — Complaint, in action against.

Under the statutes of this State a complaint against a married woman need only contain those averments which are requisite in an action at law, and if the defense of coverture be interposed by answer, it may be controverted, or avoided by evidence, under § 168 of the Code, without alleging the facts proposed to be proven for that purpose in the pleading.

The defendant purchased of the plaintiffs certain articles which were used in furnishing a house in the city of New York, of which she was the owner. She claimed that she acted as agent of her husband in making the purchase, but the referee found that the sale was made to her upon the faith of her representations that she owned the house and was herself buying the furniture to furnish it. *Held*, that the debt was contracted for the benefit of her separate estate, and that she was liable therefor.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

Orlando L. Stewart, for the appellant.

Wm. Henry Arnoux, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed.

JOHN WOOD, APPELLANT, v. HANNAH E. LOCKWOOD,
IMPLEADED, ETC., RESPONDENT.

Mortgage to secure debts of third party — liability under.

Where a married woman executed a mortgage on her property as security for goods to be sold by A. to her husband, and A., being the member of a firm, directs that firm to send goods to the husband, and becomes himself liable to the firm for the payment therefor; *held*, that, notwithstanding the goods were consigned by the firm, the transaction was one within the terms of the mortgage, and that the property was liable for the value of the goods so furnished.

FIRST DEPARTMENT, JULY TERM, 1874.

APPEAL from a judgment entered on the report of a referee, in an action for foreclosure.

W. H. Scott, for the appellant.

Moses Ely, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed, and new trial ordered, with costs to abide the event.

EDWARD H. LUDLOW AND OTHERS, RESPONDENTS, v.
NATHANIEL DOLE, APPELLANT.

Quantum meruit.

Action by plaintiffs to recover commissions for services rendered in selling certain real estate for defendant. The complaint was in form upon a *quantum meruit*, the allegation being that the sum named the plaintiffs reasonably deserved for their services. The court instructed the jury that they could not find a verdict for less than the full amount claimed, to which instruction the defendant excepted. *Held*, that as the evidence showed that a price was agreed upon, and there was no other evidence on the subject of what the services were worth, the instruction was proper. The specific price for the services became the *quantum meruit*.*

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

W. W. Niles, for the appellant.

J. H. & B. F. Watson, for the respondents.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed.

* *King v. Brown*, 2 Hill, 485; *Nones v. Homer*, 2 Hilton, 116; *Fells v. Vest-vall*, 2 Keyes, 152.

ANNA MARIA RAPP, RESPONDENT, v. WILLIAM
WILLIAMS, APPELLANT.

Injunction — Summary proceedings.

The court will not grant an injunction preventing a landlord from instituting summary proceedings against his tenant, on the ground that the landlord has extended the tenant's lease. The question of the extension of the lease is one that can be properly determined in the summary proceedings.

APPEAL from an order of Special Term, continuing an injunction restraining a landlord from taking out summary proceedings on the 1st day of May, 1874, to dispossess his tenant (the plaintiff) whose term expired on that day, on the ground that a verbal promise was given that she should have the premises for another year. This action was brought for the purpose of obtaining a temporary injunction, and restraining the defendant from interfering with plaintiff's possession till the end of the alleged extended term.

W. G. McCrea, for the appellant.

D. Thornton, for the respondent.

Opinion by DAVIS, P. J.

DANIELS and BRADY, JJ., concurred.

Order reversed, and motion to continue the injunction denied, with \$10 costs of this appeal, and \$10 costs of the motion in the court below.

JAMES L. ENGLISH AND ANOTHER, EXECUTORS, ETC., OF
PATRICK RILEY, DECEASED, RESPONDENTS, v. FRANKLIN
STEELE, APPELLANT.

Evidence — documentary — how proved.

A party plaintiff examined on the trial was not questioned in regard to certain letters written by him which conflicted with his statements made on such examination. The plaintiff died during the course of the trial, and defendant's counsel, after his death, offered the letters in evidence. They were excluded on the

ground that the plaintiff should have been questioned in regard to them and allowed to explain them on his examination. *Held*, that this was error; that "the omission to present the letter to the testator when he was examined as a witness did not prevent it from being afterward proved and read in evidence on the trial of the action." "No principle of evidence requires a party to prove and authenticate his documentary evidence by any particular person unless he be a subscribing witness to it."

APPEAL from a judgment in favor of the plaintiffs, entered on the report of a referee.

Titus B. Eldridge, for the appellant.

Sherwood & Howland, for the respondents.

Opinion by DANIELS, J.

Present — DAVIS, P. J., BRADY and DANIELS, JJ.

Judgment reversed and a new trial ordered, with costs to abide the event.

HENRY H. BUTTERWORTH, AS COLLECTOR, ETC., RESPONDENT,
v. HENRY VOLKENING AND ANOTHER, APPELLANTS.

Lease — Covenant of quiet enjoyment — liability of landlord under.

Under a covenant of quiet enjoyment contained in a lease, the landlord is not liable for the expenses incurred by the tenant in defending a suit brought by a third person claiming an interest in the leasehold premises, which claim the court, in such suit, decides to be unfounded.*

APPEAL from a judgment, in favor of the plaintiff, entered upon the report of referee.

Nelson Smith, for the appellants.

Edgar S. Van Winkle, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed.

* *Kelly v. Dutch Church* (2 Hill, 105, 111).

JOSIAH CALDWELL, APPELLANT, v. THE COMMERCIAL
WAREHOUSE COMPANY OF NEW YORK, RESPONDENT.

Usury — sale of collaterals — when restrained.

This court will continue an injunction granted to restrain a party from selling securities pledged as collateral to a loan, the complaint averring, and the answer denying, that the contracts in relation to commissions were designed to be, and were, mere covers for usury, when it appears that, in addition to seven per cent for interest and all expenses and disbursements attending the care and custody of the collaterals, and eight per cent on the gross proceeds of a sale, if one was made, a sum equal to twenty-four per cent per annum on the loan is charged for the care and custody of the bonds and stock certificates pledged, and this under an agreement which devolves all risk of loss on the borrower. It is impossible to say that the jury would not be justified in finding that this transaction was a cover for usury.

APPEAL from an order of the Special Term vacating an injunction, but the order not to take effect till the hearing of this appeal, made in an action brought to compel the surrender of securities pledged for what were alleged to be usurious loans.

G. W. Cotterill and *J. K. Porter*, for the appellant.

E. W. Stoughton, for the respondent, insisted that the court could not know judicially what would be a proper compensation for services. (*Smith v. Marvin*, 27 N. Y., 137; 40 id., 252.)

Opinion by DAVIS, P. J.

DANIELS and BRADY, JJ., concurred.

Order reversed, with costs, and an order entered continuing the injunction.

WILLIAM McDONALD, RESPONDENT, v. THE MAYOR,
ALDERMEN AND COMMONALTY OF NEW YORK,
APPELLANTS.

Contract for public work — authority to make.

APPEAL from a judgment, in favor of plaintiff, entered on the report of a referee.

This action was brought to recover the value of materials furnished and used in repairing the public streets. The court were of opinion that if the several cargoes were to be treated as separate items, the superintendent of roads had no authority to make the contracts of purchase without the necessity therefor being first certified by the head of the appropriate department to the common council, and the expenditure being upon such certification ordered by the common council. (§ 38, chap. 446, of 1857.)

If the plaintiff's demands were to be treated as arising under one contract, and thus constituting a single item exceeding \$250, the proposal should have been made upon sealed bids or proposals invited by public advertisements. (§ 38, chap. 446, of 1857.)

E. Delafield Smith, Counsel to the Corporation, for the appellants.

Henry Parsons, for the respondent.

Opinion by DAVIS, P. J.

DANIELS and BRADY, JJ., concurred.

Judgment reversed, and a new trial ordered, costs to abide the event.

JOSEPH H. WILLIAMS, APPELLANT, v. JAMES IRVING,
RESPONDENT.

Judgment — Discharge of — when will not be ordered on conflicting affidavits.

APPEAL from an order setting aside supplementary proceedings, and ordering a judgment to be discharged.

The plaintiff in this case recovered a judgment against defendant for \$14,449.11, on July 19, 1862, which, with interest, amounted on this hearing to more than \$25,000. It was not denied that the judgment was regularly recovered.

The affidavits, on the part of the defendant, showed that the judgment was compromised. This was most positively denied by the affidavit of the plaintiff. The justice, at Special Term, thought the preponderance of evidence decidedly with the defendant, and ordered the judgment to be discharged, and supplementary proceedings commenced thereon to be set aside.

The court, at General Term, did not think it provident to order the absolute discharge of so large a judgment upon conflicting affidavits, and modified the order by striking out the provision directing that the judgment be discharged, and in place thereof inserted an order that a referee be appointed to take the evidence in regard to the alleged compromise, and report thereon.

Thos. Stevenson, for the appellant.

Garvin, Fellows & Brooke, for the respondent.

Opinion by DAVIS, P. J.

DANIELS and BRADY, JJ., concurred.

Order, as modified, affirmed, costs to abide event.

AUGUSTUS HEMENWAY, APPELLANT, v. WILLIAM S.
WILSON AND OTHERS, EXECUTORS, ETC., RESPONDENTS.

APPEAL from a judgment, entered on the report of a referee, dismissing the plaintiff's complaint.

The appellant claimed that the findings of the referee were not sustained by the evidence, but the General Term were of opinion that they were, and that the judgment should be affirmed.

F. B. Candler, for the appellant.

Charles Tracy, for the respondents.

Opinion by DAVIS, P. J.

DANIELS and BRADY, JJ., concurred.

Judgment affirmed.

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as its bankers, various sums of money, which said deposits, on the said 20th day of March, 1873, after deducting all credits due to said defendants, amounted in the aggregate to the sum of \$29,500, leaving the defendants, on said last mentioned day, indebted to the plaintiff in the aforesaid sum and interest." That the plaintiff had, since the said sum became due, demanded payment thereof from the defendants, who refused to pay the same, and that no part thereof had been paid. *Held*, That these allegations showed only a cause of action arising upon contract, and that there was no averment from which it would be justly inferred that the indebtedness sued for was for money received in "a fiduciary capacity," within the meaning of the Code.

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2. — *Order of — Fraudulent conspiracy, must be alleged in complaint.*] The affidavits used by the plaintiff on a motion for an order of arrest, contained allegations tending to show a fraudulent conspiracy between Rose, the plaintiff's treasurer, and defendants, to get into the possession of defendants the money of plaintiff, so that Rose could use the same by defendants' aid and connivance, in his individual stock speculations. *Held*, that an action to recover for such fraudulent acts, could only be maintained upon a complaint charging the alleged fraud and conspiracy; that such a cause of action was inconsistent with the cause set forth in the complaint, and that an order of arrest in this action could not be sustained. *Id.*

— *Order of — Fugitive, surrendered under extradition treaty — when cannot be arrested in civil action — Waiver of right to move to vacate — when giving bail is not.*

See EXTRADITION TREATY, 2, 3.

ASSESSMENTS — *Chap. 674, 1870 — Lands in village of Edgewater — how assessed.*] 1. Section one of title six of chapter 674 of the Laws of 1870, provides that the assessment roll for the village of Edgewater is to be prepared "in all respects, as far as practicable and consistent with the provisions of this act, in the manner prescribed by law in respect to assessments made by town assessors."

Land in the village belonging to the plaintiff, who was a non-resident, was assessed to him as a resident. *Held*, that the provisions of the Revised Statutes relate only to the taxes to be raised for town, county and State purposes; that under its charter, all lands in the village must be assessed in the name of the owner or occupant, and that the non-residence of an owner only gives him the right to be notified of the sale as provided by the act.

GLOVER v. VILLAGE OF EDGEWATER..... 486

2. — *Municipal officer — neglect of, to make return of assessments as required by law — effect of, on sale of lands by him, for unpaid assessment.*] Section five of title twelve of the charter of the village of Edgewater, requires that, at the expiration of ninety days from the delivery of the warrant to him, "the treasurer shall make a return, under oath, of all such taxes and assessments upon any lands or premises which shall be unpaid in whole or in part, and shall file the same in the office of the village clerk; and such treasurer shall annually, between the first day of March and the first day of April, cause such lands to be advertised for sale at public auction;" *held*, that the neglect of the treasurer to make the return as required by the act, did not deprive him of the power of selling the lands. *Id.*

3. — *Variance between provisions of charter and ordinance of common council — when immaterial.*] The charter of the city of Rochester required the expense of local improvements to be assessed on the land, but also made it a charge against the owner, and gave authority to collect it from him. It also provided that all assessments thereafter made should be valid, notwithstanding any irregularity, omission, etc. The common council passed an ordinance directing that the expense of a local improvement be defrayed by an assessment on the owners of the lots benefited. *Held*, that it was not material that the ordinance was not couched in the precise language of the charter, and that at most it was an irregularity which was cured by the provisions of the charter. BUTTS v. CITY OF ROCHESTER..... 506

— *When incumbrances — Lien of — effect of statute of limitations on.*

See CONTRACT, 7.

ASSETS— *Of insurance companies — when exhausted.*

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See INSURANCE, 1.

ASSIGNEE— *Of cause of action — takes it subject to defense of set-off.*

See SET-OFF, 1.

ASSIGNMENT— *For benefit of creditors — Construction of — Passive trust.]*

1. An assignment of property in trust for its sale and the payment of the assignor's debts, and for the investment of the residue, if any, for the assignor's use during his life, and, in case of his decease before the completion of said trust, and the payment of his debts, that the residue be passed over to his heirs-at-law, gives the assignor's heirs no estate, unless he dies before his debts are paid. No trust is thereby created in the surplus after payment of debts, as a mere passive trust to hold property for another's use cannot exist under the laws of this State. *KITTELL v. OSBORN*..... 613

2. — *For benefit of creditors — Chap. 348, 1860 — Bond given by assignee under — sureties on — liability of.]* The defendants are sureties upon a bond given by one De Camp, in pursuance of chapter 348, Laws 1860, for the faithful discharge of his duties as assignee, under an assignment made by insolvent debtors for the benefit of their creditors. Certain judgment-creditors of the assignors subsequently brought suits in which judgments were recovered setting aside the assignment as to them on the ground of fraud, and directing the assignee to pay over to them certain sums in said judgments mentioned. The assignee having failed to comply with the terms of the judgments, this suit was brought. *Held*, that the defendants were not liable. The object of the bond required by the statute is to render general assignment, by insolvent debtors more efficient, and to secure the full and faithful application of the debtors' property to the discharge of the creditors' demands, according to the directions contained in the assignment, and it is no part of the design of the statute to defeat the assignment, or to provide means, or secure the ends, by which that might be accomplished.

PEOPLE v. CHALMERS..... 668

ATTACHMENT— *Granted, at time of issuing summons, against property of non-resident. Effect of omission to procure order for publication of summons, or personal service thereof, within thirty days.]*

1. Where an attachment was granted against the property of the defendant, as a non-resident, at the time of issuing the summons, and no order of publication was obtained within thirty days thereafter, and the defendant was not personally served with the summons during said period, *held*, that the attachment was thereby invalidated, and should be set aside. *TADDIKEN v. CANTRELL*..... 710

— *When undertaking given on, defendant will not be allowed to set up by supplemental answer his discharge in bankruptcy.*

See BANKRUPTCY.

ATTORNEY— *When knowledge of, is not knowledge of client.]* 1. The rule that knowledge by a solicitor is knowledge by the client, where the solicitor is himself the borrower, has never been adopted in this State.

HOPE INS. CO. v. CAMBRELLING..... 493

2. — *Lien of, for costs — when subject to right of set-off by opposite party.]* The lien of an attorney for his costs, on the judgment recovered, is subject to the right of set-off, in a proper action against the client for that purpose. When, however, the client assigns the judgment, or the costs accrued and to accrue in the action, to his attorney, as security for his costs, the opposite party loses his right of set-off, as the assignment becomes operative before the right of set-off attaches.

The right of set-off does not attach until the judgment sought to be set off has been actually recovered. *FIRMENICH v. BOVEE*..... 532

AUTHORITY— *What allowed to qualify.]* Defendant, after testifying that any boy or salesman at the door would receipt for packages received, was asked, whether he ever authorized any clerk to sign a receipt, stating who the owner of the goods was; *held*, that the evidence was properly excluded; that from defendant's own statement, the person receiving the goods, appeared to be authorized to sign the receipt; and that no private instruction, not communicated to the other party, was admissible for the purpose of qualifying this authority. *GALLUP v. LEDERER*..... 268

AWARD — *Admissibility of, in evidence, to prove title to goods, in an action to recover the price of them.*

See EVIDENCE, 19.

BAILMENT — *Bank — packages received by, for safe-keeping — when responsible for — when entitled to compensation for.* This action was brought to recover for the loss of certain securities deposited with the defendant. The defense was, that the bank had refused to receive packages for safe-keeping, for some time before the package in question was left, and that no compensation had been paid or agreed to be paid for keeping the package, and hence the bank was only liable for gross negligence. At the trial, it appeared that the bank had formerly been in the habit of receiving packages for safe-keeping, and that such business was not wholly discontinued at the time of receiving the plaintiff's package. *Held* (1), that, as no instructions were given to the subordinate officers of the bank to reject packages, and as no notice had been given that they would not be received, the receipt of such officers would bind the bank; (2), that, as the bank had been in the habit of taking money packages for safe-keeping, and as it did not appear that they were kept without charge, and unless they were so kept, the bank had the right to demand pay for the service, in which case the bailment would not be a gratuitous one, the case should have been submitted to the jury, and that the court erred in directing a nonsuit. *PATTISON v. SYRACUSE NAT. BANK....* 604

BANK — *Packages received by, for safe-keeping — when responsible for — when entitled to compensation for.*

See BAILMENT.

— *National — residence of, within meaning of act of Congress, authorizing the removal of causes.*

See REMOVAL OF CAUSE.

BANKRUPT LAWS — *Title acquired under foreign — not recognised by courts of this State.*

See FOREIGN LAWS.

BANKRUPTCY — *Discharge in — when not allowed to be set up in supplemental answer — Attachment.* In an action commenced against the defendants, who were non-residents, an attachment was issued, to procure the dissolution of which, an undertaking, with sureties, was given. Some two years after the commencement of the action, and while it was pending before a referee, the defendants commenced proceedings in bankruptcy, and, having procured their discharges, applied to the court for leave to file a supplemental answer, setting up the discharges so procured, as a defense to the suit. The court, at Special Term, refused to allow them to do so. *Held*, that this was proper. *HOLYOKE v. ADAMS.....* 223

BEST EVIDENCE — *Memorandum — parol evidence of contents of — not admissible.*

See EVIDENCE, 25.

BIGAMY — *Place of trial of — trial cannot be had in county, where offense was not committed nor prisoner apprehended.* 3 R. S. [5th ed.], 968, § 10.

See CRIMINAL LAW, 11.

BILL OF EXCEPTIONS — *Settlement of — Exceptions, how stated in — Mandamus.* 1. A bill of exceptions should contain only a concise statement of facts, presenting the points intended to be relied upon as ground of error, or simply so much of the evidence as may appear to be requisite for that purpose. *TWEED v. DAVIS.....* 263

2. — *Trial.* The court cannot determine whether any particular thing occurred on the trial; that is necessarily within the province of the justice settling the case or bill. *Id.*

3. — *Mandamus.* The justice cannot be compelled by mandamus to change his decision. *Id.*

4. — *Exceptions — how taken.* A large number of written propositions was presented at the conclusion of the evidence, which the court was

BILL OF EXCEPTIONS — *Continued.*

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requested, by the defendant's counsel, to instruct the jury to be the law. In many of these, the court differed from the defendant's counsel in the charge which was given to the jury; and, as that was concluded, and the jury were about to retire, the defendant's counsel stated that they excepted, for the defendant, to each refusal, modification or departure which had been made in the charge, from the propositions submitted. *Held*, that defendant's counsel were not entitled to insert, in the bill of exceptions, specific exceptions to the several portions of the charge which they considered constituted such refusals, modifications or departure. *Id.*

See EXCEPTIONS, 3; CRIMINAL LAW, 6.

5. — *When and by whom settled.*] Plaintiff in error was convicted of perjury at a court of sessions, held on August 27th, 1872, and sentenced. On August 26, 1873, a bill of exceptions was settled by the county judge and justices of sessions of the county where the conviction was had, none of whom took part in the trial, or were, at the time thereof, members of the court. *Held*, that no bill of exceptions had been settled as required by law. The same court which tries a criminal must settle the bill of exceptions, and such settlement must take place before the final adjournment of the court, at which the trial is had. *WOOD v. THE PEOPLE* 861

BILLS OF EXCHANGE — *Usury — Accommodation draft, accepted to be used in another State — when usurious — Sureties of corporation — usury cannot be pleaded by.*] The Lenox Glass Company, a corporation residing and doing business in the State of Massachusetts, drew a draft on the firm of D. S. Schank & Sons, of which the defendants are members, which firm then resided and carried on business in the city of New York. The draft was accepted by the firm for the accommodation of the drawer, and subsequently discounted by it in Massachusetts, at a rate which was, according to the laws of New York, usurious.

The draft was subsequently transferred to the plaintiff, which brought this action thereon. *Held*, that it was entitled to recover; that the defendants, by accepting the draft for the accommodation of the drawer, became simply sureties for its payment, and hence, neither they nor their principal, the corporation, could, under the laws of this State, interpose usury, as a defense in an action upon the draft.

Semble, that by the acceptance of the draft for the accommodation of the drawer, the inference would seem to be natural and proper, that it must have been intended that the drawer could use it in any manner which might be lawful at the place of its residence, and that the fact of its being discounted at a rate, lawful there, but usurious here, would not affect its validity.

FIRST NAT. BANK OF N. Y. v. MORRIS 680

BONA FIDE — *Purchaser of stolen bonds, when — rights of.*

See BONDS, 3.

— *Purchaser of town bonds — rights of.*

See TOWN BONDS, 1, 2, 3.

BONDS — *Liability upon — consideration of.*] 1. Certain moneys owing by the plaintiff, to one Campbell, had been attached by the sheriff in a suit brought by J. and D. Carolin against said Campbell. Judgment having been recovered in this suit, the plaintiff refused to pay over the money unless it was indemnified. A bond was accordingly executed by the defendants, conditioned to "indemnify, save, defend and keep harmless the said Home Insurance Company from and against the claims of the said James T. Campbell and of all other persons claiming or to claim the said moneys so paid by the said insurance company to said sheriff, and of and from all costs, damages and expenses that shall or may happen or arise therefrom;" and the money was paid to the sheriff. Campbell subsequently sued the insurance company for the money, and was defeated, and judgment rendered against him, the costs and expenses of the company, in such suit, being \$2,837.91; Campbell being insolvent, this suit was brought upon the bond to recover said amount. *Held*, that defendants were not liable; that as to the claim of Campbell, it was established by the judgment of the court, in which he sought to enforce it, that he had none; and that the costs, damages and expenses included in

BONDS — Continued.

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the judgment, did not arise because of any just and lawful claim, but from the false assertion of one against which the covenant was not intended to indemnify.

Quere, whether the bond was not void for want of consideration, as it was the duty of the insurance company to pay over the money to the sheriff upon the recovery of the judgment in the attachment suit.

HOME INS. CO. *v.* WATSON 642

2. — *When negotiable.*] Bonds were issued by the city of Poughkeepsie, payable "to the said ——— his executors, administrators and assigns." *Held*, That these terms, following the space left for the insertion of the name of the payee or holder, were sufficient to render them negotiable.

DUTCHESS COUNTY INS. CO. *v.* HACHFIELD 675

3. — *Stolen — Bona fide purchaser of — what constitutes — rights of.*] This action was brought to recover five of these bonds which had been feloniously stolen from the plaintiff, their lawful owner, shortly before they were purchased by the defendants. At the trial, the defendant's counsel requested the court to charge, that if "Hachfield & Co. purchased these bonds in the open market for full value, and in the usual course of business, without notice or suspicion, they were not bound to make a close and critical examination in order to escape the imputation of bad faith in the purchase." The court declined so to charge, and left it to the jury to say how much of an examination they were to make. *Held*, that this was error, and that, as it was not cured by the charge, which was still more unfavorable to the defendant, that the judgment should be reversed, and a new trial granted. *Id.*

— *Town bonds — bona fide purchaser of — rights of.*

See TOWN BONDS, 1, 2, 3.

— *Bond of assignee, given under chapter 348, 1860 — Sureties on — liability of.*

See ASSIGNMENT, 2.

— See TOWN BONDS.

BOUNTIES — Contract in relation to — void as against public policy — Complaint — evidence tending to show different cause of action from that alleged in — amendment of, at trial.] In August, 1864, the son of John Saltsman, the defendant's intestate, being liable to be drafted, Saltsman entered into an agreement with the plaintiff, whereby he agreed to pay him \$500, and that he, the plaintiff, should have all the county and town bounties that his son or any substitute he should procure, would be entitled to, if he, the plaintiff, would furnish a substitute for his son. The plaintiff furnished the substitute and received from the defendant \$500, and the bounty which the county was then paying. Subsequently the town passed a resolution to pay \$425 to certain volunteers and substitutes, among whom was the substitute furnished by plaintiff. Saltsman obtained from the town authorities \$100 of this bounty, to recover which, this action was brought against him for money had and received for use of the plaintiff. *Held* (1), that no one but the substitute or his assignee was entitled to the bounty. (2.) That the claim, at the time of the agreement, was no more than a mere contingent possibility, not coupled with an interest, and hence incapable of being sold and assigned. (3.) That the agreement between the plaintiff and Saltsman, in so far as it related to bounties thereafter to be voted and offered, was void as against public policy. (4.) That the plaintiff was not entitled to recover.

The complaint was for money had and received by the defendant, to the plaintiff's use. At the trial, plaintiff was allowed to prove an assignment from the substitute, of his claim to the bounty. *Held*, that the evidence was inadmissible, as it tended to show a new and independent cause of action not set out in the complaint. DECKER *v.* SALTSMAN 431

BRIDGES — Neglect to repair — when commissioners of highways not liable for.

See COMMISSIONERS OF HIGHWAYS, 8.

BUSINESS — What is carrying on, by married woman.

See MARRIED WOMAN, 4.

CASE — *On appeal from order granting new trial—what should contain.* PAGE.
See NEW TRIAL, 2.

CASES OVERRULED, APPROVED, DOUBTED, ETC.:
See TABLE OF CASES CITED.

CERTIORARI — *Title to office cannot be inquired into, upon* — Chapter 538 of 1873.] 1. Upon the application of the relator, a writ of certiorari was issued to review his conviction for assault and battery in the Court of Special Sessions, in the city of New York, on the ground that the respondents, who, acting as police justices, constituted the said court, had no lawful authority to hold the same, the act under which they were appointed being unconstitutional. *Held*, that the police justices, if not such *de jure* were such *de facto* with color of title, and that their acts must be obeyed and respected, until judgment of ouster be pronounced against them. Having apparent authority to act, and having rendered judgment between the prisoner and the people, neither can, in this collateral way, call in question the title of the judges. *COYLE v. SHEERWOOD*, 272

- *What errors cannot be reviewed by.*
See THE PEOPLE v. VILLAGE of DANVILLE..... 593
- *To review proceedings of commissioners of highways — When quashed.*
See COMMISSIONERS OF HIGHWAYS, 1.

CHARGE — *Made at prisoner's request — cannot afterward be objected to by him.*] 1. Writ of error to review the conviction of the plaintiff in error, at the Court of General Sessions, upon an indictment for an assault with intent to kill. Before the case was submitted to the jury, the prisoner's counsel requested the court to charge that he could not be convicted, under the indictment, for an assault with a sharp, dangerous weapon, with intent to do bodily harm, and the court so charged. *Held*, that the charge having been made at his request, he could not afterward object to it, although it was clearly erroneous; or could he have been prejudiced by this error, as the jury by their verdict, negatived the idea that the crime committed by him was anything less than that charged in the indictment. *SLATTERY v. THE PEOPLE*..... 311

2. — *Refusal to charge as to punishment of prisoner, if convicted, correct.*] The judge refused to instruct the jury as to the punishment of the prisoner, if convicted. *Held*, that this was correct; the jury had nothing to do with the punishment, nor had the degree thereof any possible right to influence their verdict. *WOOD v. PEOPLE*..... 381

- *Error in — when new trial not granted on account of.*
See PROMISSORY NOTE, 2.

CHATTEL MORTGAGE — *Delivery.*] 1. Where property covered by a chattel mortgage is in the possession of a third person, an immediate delivery thereof is not necessary. *SMITH v. POST* 516

2. — A mortgage provided that in case of default in payment, or in case the mortgagees should at any time deem themselves unsafe, they might take possession of the property and sell the same. *Held*, that this provision was for the benefit of the mortgagees, and authorized them to take possession when, in their judgment, they deemed it best for the safety of their demands so to do, and that no proof was required to show that they considered themselves unsafe, as the legal presumption would be that such was the fact, when possession was taken before the mortgage was due. *Id.*

3. — *Fraud of mortgagor — when will not affect rights of mortgagees.*] The fraud of the mortgagor will not affect the rights of the mortgagee to the property mortgaged, unless he was a party or privy to it, and received the mortgage with the intent to hinder, delay or defraud the creditors of the mortgagor. *Id.*

4. — *Given to two persons to secure separate debts — when void as to one mortgagee, and good as to the other.*] Where a mortgage is made to two persons to secure separate and distinct debts, the knowledge and fraudulent intent of one of them will not affect the other. The mortgage will be void as to one and good as to the other. *Id.*

5. — *Given to secure promissory note — rights of bona fide purchaser of note.*] A bona fide purchaser, before maturity, of a promissory note secured

CHattel Mortgage—*Continued.*

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by a chattel mortgage, takes the mortgage as he takes the note, free from any equities which existed in favor of third parties while it was held by the mortgagee. *GOULD v. MARSH*..... 566

CLIENT—*When knowledge of attorney, is not knowledge of.*

See ATTORNEY, 1.

"& CO."—*Liability arising from use of.*

See PARTNERSHIP, 3.

"C. O. D."—*See* COMMON CARRIER.

CODE—§§ 78 and 81 are to be read together. *WOOD v. SQUIRES*..... 431

— §§ 125, 126.

See VENUE.

— *Publication of summons*—§ 135, sub. 4—*when does not authorize publication of summons.*

See GALUSHA v. FLOUR CITY NATIONAL BANK 573

— *Publication of summons*—§ 135, sub. 5, *deprives court of power to open decrees of absolute divorce, upon proof that defendant did not receive copy summons or notice of publication, and upon affidavits showing a defense.*

See DIVORCE, 1.

— § 163—*Complaint in action against indorser—copy of indorsement not set out in.*

See PROMISSORY NOTE, 13.

— § 168—*The defense of coverture, interposed by answer, may be controverted or avoided by evidence, under § 168 of the Code, without alleging in the complaint the facts proposed to be proven for that purpose.*

See MARRIED WOMAN, 8.

— § 179—"Fiduciary capacity"—*Money deposited with bankers—when not received in fiduciary capacity.*

See ARREST, 1.

— § 227—*Attachment against property of non-resident—invalidated by omission to procure order for publication of summons, or personal service thereof, within thirty days.*

See ATTACHMENT, 1.

— § 267—*as to entry of judgment within four days after filing of decision, directory.*

See FORECLOSURE, 2.

— § 275—*any relief consistent with the facts may be given under.*

See PLEADINGS, 1.

— § 318—*by it, appellate court, pro hac vice, a court of original jurisdiction.*

See EXTRA ALLOWANCE, 1.

— § 334—*undertaking required to be given by, does not of itself stay proceedings.*

See UNDERTAKING, 2.

— § 427—*Jurisdiction of the courts of this State over foreign corporations.*

See FOREIGN CORPORATIONS.

— **SEE TABLE OF SECTIONS OF CODE CITED.**

COMMISSIONERS OF HIGHWAYS—*Certiorari to review proceedings of—when quashed.*] 1. Where nearly two years had elapsed since the filing of an order of the commissioners of highways laying out a road, and where the report of the commissioners appointed to assess the damages of those whose lands were taken had been filed, and such damages had been assessed upon the town and paid over to the commissioners of highways,—*held*, that the court would, in its discretion, quash a *certiorari*, issued to review such order. *PEOPLE v. LANDRETH* 544

COMMISSIONERS OF HIGHWAYS—Continued.

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2. — *Right of one whose lands are taken, to act as commissioner to assess damages.*] *Semble*, that a commissioner of highways is not disqualified, because he owns lands, over which he unites with other commissioners in laying out a road. *Id.*

3. — *Negligence in repairing bridges—when liable for—Proving possession of funds by them—onus of—necessity of.*] The defendants, as commissioners of highways, had, several weeks prior to July 17, 1873, caused the plank covering to be removed from a bridge which had become unsafe, and had drawn a quantity of stone to the place, for the purpose of repairing the bridge, the openings of which they had closed. On the east side of the bridge, good approaches had been graded by the defendants, from the bed of the creek each way. On the seventeenth of July, the plaintiff, who was well acquainted with the situation of the bridge and creek, attempted, on a dark night, to cross the stream; which was very much swollen by a sudden and severe storm, and in so doing his horse was drowned. In an action brought by him to recover the value of the horse, *held*, that he was properly nonsuited; that he was guilty of negligence in attempting to cross the stream under the circumstances, and that his injury did not result from the omission of the defendant to repair the bridge, in such a sense, and with such intimacy of connection as to render the defendants liable therefor.

At the trial, the court held that the defendants could only be liable upon proof that there were funds in their hands with which to repair the bridge, and nonsuited the plaintiff, because no such proof had been given.

Semble, That it was too late for the defendants to raise that point; that the presumption of the possession of funds was against them, upon the ground that they had recognized their duty to repair the bridge by commencing so to do; and upon the ground that the *onus* was upon them to show that they had no funds. *DAY v. CROSSMAN* 570

COMMISSION ROGATORY—When issued.] The plaintiff applied to the court for a commission to be issued to the French courts, to enable him to examine two witnesses orally, on the ground that one of the witnesses had already been examined on commission, and, as he claimed, testified falsely, and that he feared the other would do so. *Held*, that the application was properly denied. The mode of taking testimony abroad, is established by the Revised Statutes, and it is not to be departed from, unless the court cannot otherwise obtain the testimony. *FROUDE v. FROUDE*..... 76

COMMON CARRIER—When holds property as warehouseman—then liable only for negligence—negligence not presumed—Express Co. receipt—limitation of liability by terms of—"C. O. D."] Plaintiff delivered to defendant, at Fort Plain, N. Y., February 20, 1871, a box, marked "S. F. Dana, Malden, West Va., C. O. D., \$45," and his son and clerk drew up a receipt therefor from blank receipts left by defendant with plaintiff, which was signed by the defendant and returned to plaintiff. By the terms of the receipt, defendant undertook to forward the box to the nearest point of destination reached by it, but was not to be liable for any loss, except as forwarder, nor for loss by fire, nor for any default or negligence of any company, to which the property might be delivered for transportation, off the route of defendant; and such company was to be regarded as the agent of the consignor. The defendant transported the box to Columbus, Ohio, the nearest point on its route to West Virginia, and delivered it to the Adams' Express Company, by which it was transported to Malden and tendered to the consignee, who refused to receive it and pay charges. Subsequently, and on the second of March, the office of the company, and with it this box, was burned; *held*, that the defendants were not liable. The ordinary character of the shipment was not affected by the words, C. O. D., and the contract thereby expressed, until the collection should, in fact, be made. After the tender and refusal of the consignee to accept the box, it was held by the company as a warehouseman, and the company could only be made liable by reason of its negligence, which cannot be presumed but must be proven; and as, in this case, there was no proof as to the cause of the fire, the defendant was not liable. *GIBSON v. AMERICAN MERCHANTS' U. EX. CO.*..... 337

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COMPLAINT — *Failure to show title in subject-matter of action — when objection may be taken at trial.*] 1. A complaint must always show title in the plaintiffs of the subject-matter of the action, or such an interest therein as indicates them to be proper parties to the litigation; otherwise it fails to state facts sufficient to constitute a cause of action in favor of plaintiffs against defendant. This objection may be taken at the trial, and need not be raised by demurrer. *MOSELMAN v. CAEN*..... 647

— *Fraudulent representations, not alleged in, cannot be proved at trial.*
See EVIDENCE, 11.

— *Amendment of, at trial — Evidence tending to show cause of action different from that alleged in.*
See BOUNTIES.

— *In action against indorser — what must be alleged in.*
See PROMISSORY NOTE, 13.

— *In action against married woman — need only contain those averments requisite in an action at law, and facts controverting or avoiding defense of coverture need not be alleged.*

See MARRIED WOMAN, 8.

— *Order of arrest — "Fiduciary capacity" — Fraudulent conspiracy — must be alleged in.*

See ARREST, 1, 2.

— *Quantum meruit.*
See QUANTUM MERUIT.

COMPROMISE — *When sustained — Conditional delivery — Statute of frauds.*] Defendant being the owner of three lots of wool, the plaintiffs entered into an agreement with him for the purchase thereof, in pursuance of which, two lots were delivered, and payment therefor was demanded by the defendant, and refused by the plaintiffs, who claimed that the third lot was included in the agreement; which was denied by the defendant. Subsequently, an agreement was entered into by the parties, embracing the third lot of wool, which was to be handled and delivered by the defendant, at Troy, at the original contract price, in pursuance of which the plaintiffs paid the defendant \$18,357.60, the price of the wool already delivered, as part of the purchase-price of the whole of the wool. The defendant having refused to deliver the third lot of wool, this action was brought by the plaintiffs to recover damages therefor. *Held*, that the second agreement was valid as a compromise of doubtful and conflicting claims, and that, by the payment of the \$18,357.60, as part of the purchase-price of the whole of the wool, the contract was taken out of the statute of frauds. *ORGAN v. STEWART*..... 411

CONDITIONAL SALE — *Delivery.*] 1. Plaintiffs sold to Webb & Co., May 21st, 1867, a quantity of teas, for cash on delivery. The teas, when sent for on the twenty-fourth, were found to be in a condition requiring cooperage; and, the cartman refusing to receive them, it was arranged that he should take them to Webb & Co.'s store, and that the plaintiffs should send their cooper to do the necessary work. The bill was sent to Webb & Co. the same day, but they refused to pay it until the cooperage should be done. The next morning the cooper went to the store, but was not allowed to do the work at that time; on the same day, the plaintiffs, supposing the coopering to have been done, again sent the bill, and payment was again refused, for the same reason; about noon of that day, the defendants purchased the teas of Webb & Co., who had become insolvent. *Held*, that the sale was conditional; that a delivery upon such sale vests no title in the purchaser until the cash be paid, unless the condition be waived; and that, in this case, there was no waiver, or intention to waive the condition of payment. *HILL v. MCKENZIE*..... 110

2. — *When made in good faith, condition sustained as against creditors of vendee.*] A conditional sale of goods, under which the title to those sold, and to such other goods as might be purchased and added to the stock by the vendee, was to be in the vendor, until certain moneys should be paid by the vendee, will not protect the sheriff for levying upon the goods under

CONDITIONAL SALE — Continued.

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an execution against the vendee, when, before such levy, the vendor had taken possession of both the goods sold (to which, at the time of sale, he had a good title), and of those purchased by the vendee since the sale.

In an action brought by the vendor against the sheriff for taking and selling such goods, the jury having found that the vendor's possession was not fraudulent or in bad faith, *held*, that he was entitled to recover their value from the sheriff. *POWELL v. PRESTON*..... 518

3. — *Machine to be tried.*] The plaintiff's intestate sold and delivered to the defendant a Buckeye reaper and mower, and it was agreed, that if the machine did not work well, the defendant need not keep or pay for it. The machine did not work as a reaper, but was a good mower. The defendant used the machine during the season of 1868, and had it repaired by plaintiff's intestate in the spring of 1869, upon the agreement that, if the machine did not work well, the defendant need not keep it. Defendant used the machine during the season of 1869, and nearly wore out the mowing part, which worked well after it was repaired in 1869. In an action brought by the plaintiff, the referee directed judgment in his favor, for the value of the machine as a mower. *Held*, that the defendant was only entitled to try the machine for a reasonable time, but that such reasonable time was exceeded by the defendant, and that he was clearly liable for the mower; and that the referee might have presumed, from his retention of the machine for so long a time, that he had accepted the whole machine. *MOORE v. PICKARD*..... 606

CONFEDERATE MONEY — Payment in.

See CONTRACT, 3, 4.

CONSIDERATION — Presumed in case of promissory note, but not in other contracts.

See PROMISSORY NOTE, 9.

CONSIGNEE — Advances by.] Tobacco was consigned to the plaintiff by S. & E., on which he made advances, the business being transacted through the defendants, who were also in advance to S. & E. To secure the defendants, S. & E. authorized them to draw on plaintiff for any balance on the shipment in his hands. Defendants drew on plaintiff for \$1,000, and the draft was accepted by him for, and charged to the account of, S. & E. The amount realized upon the sale of the tobacco was not sufficient to repay the advances made by the plaintiff. *Held*, that the defendants were not liable for the deficiency arising upon the sale, the evidence showing that the advances were made, not to them, but to S. & E. *OXLEY v. KING*..... 116

CONSTITUTIONAL LAW — Statutes — constitutionality of — Chapter 483 of 1869 — Town bonds — Constitution, article 1, § 7.] 1. The legislature has power to require a town to pay bonds issued for a local improvement, though the statute under which they were issued is unconstitutional.

KNAPP v. TOWN OF NEWTOWN..... 268

2. — Chapter 538 of the Laws of 1873, entitled "An act to secure better administration in the Police Courts of the city of New York," is constitutional. *COYLE v. SHERWOOD*..... 272

3. — *Sec. 16, Art. 3, of the Constitution — Chapter 285, 1873 — constitutionality of.*] In 1873, an act was passed, entitled, "An act to authorize the village of Dansville to create a debt for the purpose of bringing water into said village for protection against fires, and to amend the charter of said village." The first four sections of the act authorized the trustees to introduce water into the village, and to create a debt and issue bonds to the amount of \$25,000; the remaining sections amended various portions of the charter of the village. *Held*, that the act did not violate section 16 of article 3 of the Constitution.

That the act was, in substance, one to amend the charter of the village, and that the conferring of power to create a debt for the purpose of supplying the village with water, is only one of the elements of this general subject which is stated in the title. *PEOPLE v. VILLAGE OF DAINVILLE*..... 592

— *Enforcement of maritime claims.*

See SHIPS AND VESSELS.

CONSTRUCTION— *Of will — Words must give way to intention.* PAGE.
See WILL, 5.

CONTEMPT — *Refusal to answer question.*
See EVIDENCE, 1.

— *Fugitive from justice.*
See CRIMINAL LAW, 8.

— *For violation of injunction — Referee — when it is his duty to take proof as to, and determine the extent of, the injury sustained.*
See INJUNCTION, 1.

— *Merest technical objection is available, where party intends no contempt, but acts under legal advice in pursuing what he thinks his duty.*
See MANDAMUS, 6.

CONTRACT — *Rescission of — when allowed.*] 1. The plaintiff was induced by fraudulent representations, made by the defendants, to purchase, in February, a store of goods, together with the fixtures and the leases of the property, for \$4,000; in payment of which he gave two notes, made by himself, for \$500 each, and a bond and mortgage, which he had procured to be executed for the residue. The plaintiff took possession of the store, disposed of the goods and collected the rents, until the twenty-second of May, when he discovered the fraud; offered to restore the goods then unsold, the fixtures and the leases, and, his offer not being accepted, he then disposed of the residue of the goods. This action was brought to rescind the purchase, and procure a return of the notes and the bond and mortgage; *held*, that as he had put it out of his power to return what he had received by the purchase, he could not rescind the contract. In order to entitle a party to rescind a sale or purchase of property, on account of fraud, he must be able to restore and return what he himself has received. Where that cannot be done, the fraudulent transaction cannot be annulled. *SINCLAIR v. NEILL*..... 80

2. — *Power of referee to allow amendments to complaint on.*] At the trial, the plaintiff applied to the referee for leave to amend the complaint by alleging that he had sustained damages, by reason of the false and fraudulent representations contained in the complaint, to the amount of \$5,000, and demanding a recovery of such damages; and that the same, because of the vendor's insolvency, should be declared a lien upon any amount found due from him on account of the sale. The referee permitted this amendment to be made against the objection of the defendants; *held*, that this was error; that the amendment introduced a new and independent cause of action into the case, not within the issues referred to the referee to try; that the referee should have suspended the trial, until relief could be obtained by special motion, on notice before the court. *Id.*

3. — *Disaffirmance of — Payment.*] A dispute having arisen as to the price at which plaintiff had sold certain property to defendant, an agreement was entered into at Richmond, Va., in 1863, by which the defendant was to pay, and the plaintiff to receive, \$50,000, in full settlement of all claims and demands, in fulfillment of which, a check was drawn upon a bank in Richmond, Va., and the same was, upon presentation by the plaintiff, paid to him in Confederate bills. It appeared from the evidence that the settlement and the mode of payment were all parts of one transaction. This action was brought by the plaintiff, without having tendered repayment of the money, to recover upon the settlement, he claiming that the payment was void, on account of duress. *Held*, that the complaint should have been dismissed; that the court could not affirm one part of the transaction and disaffirm another part. *LESTER v. UNION MANUFACTURING CO.*..... 286

4. — *Confederate money.*] It appearing from the evidence that the only kind of money used in the banks at Richmond, at that time, was Confederate bills, and that all checks made payable at those banks were payable in those bills, *held*, that the debt created by the contract was payable in Confederate money, and that payment in such money was valid. *Id.*

5. — *For public work — Chap. 217, 1869; Chap. 619, 1870 — Sureties — substitution of other than those mentioned in bid, after its acceptance — when not allowed.*] Commissioners appointed to lay out, etc., a public highway, published notice that proposals for doing the work would be received,

CONTRACT — Continued.

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and that each estimate must be accompanied by the consent of two sureties, who should be satisfactory to the commissioners, that they would become bound for the faithful performance of the work. Plaintiff put in a bid, and named, as sureties, A. and B. This bid was accepted by the commissioners. The plaintiff then applied to the commissioners to substitute, in place of the surety "B," one "D," which, after making some inquiry as to "D," the commissioners refused to consent to. After notice to plaintiff to execute the contract and bond with the sureties named in the bid, and that otherwise his bid would be considered as withdrawn, and after plaintiff's tendering "D," as surety in place of B., he not being able to obtain B.'s consent, the commissioners entered into a contract with other parties; whereupon the plaintiff commenced an action in equity to restrain the execution of such contract and any payment thereunder. *Held*, that the suit could not be maintained; that the doctrine that under a contract to take good security, or a good indorsed note, the obligee is bound to accept that which is in fact correct within the meaning of the contract, and cannot reject a tender of performance from mere willfulness or whim, had no application to the case; the only contract here being to accept two specified parties, and not take any responsible sureties.

ADAMS v. IVES 487

6. — *Misunderstanding of contents of, by one party to — not sufficient to avoid it.*] The defendant, who did not understand English perfectly, was informed of the contents of a contract by a scrivener's clerk, who was present at the time the contract was read and executed. In an action brought by the assignee of the other party, to recover the amount due on the contract, she set up as a defense, that she had been misinformed as to the provisions of the contract. It appeared that the contract was carefully read over twice to the defendant, and was executed by the parties in good faith. *Held*, that the plaintiff was not responsible for the error or ignorance of the interpreter; that the defendant was in fault for trusting to an incompetent person to explain the agreement, and was not entitled to claim that there was no valid contract. PHILLIP v. GALLANT 528

7. — *For purchase of land — Assessments and assessment sales — when incumbrances — Effect of statute of limitations on lien of assessment.*] Defendant agreed to purchase certain land of plaintiff, the deed to be delivered on the 8d day of January, 1874. At the time agreed upon, there were two assessments, which had been levied upon the premises, and confirmed by the trustees of the village of Williamsburgh, one in January, 1851, and the other in July, 1852, both of which stood upon the records unpaid and undischarged; the premises had also been twice sold for unpaid assessments, once in November, 1847, and again in October, 1851, both of which sales appeared on the records as unredeemed and uncanceled, but neither of the vendees had ever entered into the actual possession of the premises, or exercised control over the same. On account of these assessments and sales, defendant refused to complete the purchase. *Held*, that he was justified in so doing; that they were valid incumbrances on the premises, which the defendant was entitled to have discharged, before he could be required to perform the contract on his part. In the absence of any adverse possession, possession follows the legal title. WOOD v. SQUIRES 481

8. — *For sale of land — Fraudulent — party entitled to recover money payments made upon.*] On the execution of a contract for the conveyance of land, the plaintiff was defrauded by an intentional omission of part of the property, which the defendant agreed to convey. The fraud was not known to the plaintiff, and, after its discovery, the defendant having refused to execute a contract such as should have been drawn, *held*, that the plaintiff had a right to maintain his action to recover the money payments, and that the fraudulent contract gave defendant no right to retain the money.

MORAN v. DARRIN 490

9. — *Under seal — time of performance of, may be extended by parol.*] The defendant was desirous of purchasing premises, upon which the plaintiff held a mortgage. Being unable to make the payments at the times specified in said mortgage, he called upon the plaintiff, who agreed, by parol, that, if the defendant would purchase the premises, pay \$200 the ensuing spring, and interest on all sums remaining unpaid annually thereafter, and would make

CONTRACT — Continued.

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certain improvements on them, he would extend the time of payment of the mortgage for twenty years. The defendant purchased the premises, assuming, by his deed, the payment of the mortgage, paid the \$200, and made the specified improvements, but failed, for two years, to pay the interest.

- In an action brought to foreclose the mortgage, *held*, that the time of payment was extended by the verbal contract, and that there was no default in the payment of the principal; that the payment of the interest was a condition which the defendant must perform, but that its non-payment was not such a breach of the condition as made the whole principal due.

BURT v. SAXTON..... 551

10. — *Signed by officers of corporation, individually — when such officers not personally liable thereon.* The defendants, who were trustees of the Little Utica Cheese Manufacturing Company, and authorized to transact business in its behalf, entered into an agreement with the plaintiffs, whereby the latter agreed to manufacture cheese at the factory of the company, at a specified price, upon certain terms and conditions, in said agreement contained. The defendants were described in the body of the agreement as the trustees of the company, but it was signed by them individually. This action was brought by the plaintiffs to recover for a breach of the contract. *Held*, that they were not entitled to recover; that the contract was, in fact and in legal effect, the contract of the company, and that the defendants were not personally liable thereon. *BELLINGER v. BENTLEY*..... 563

11. — *For sale of land — Specific performance of, when obligations are not reciprocal — time of performance material.* When the obligation to sell real estate rests on one party, and it is optional with the other party to purchase or not, a specific performance of the contract will not be decreed, if the party does not exercise his option within the time given him.

CODDING v. WAMSLEY 585

12. — *For sale of land — Time — when of the essence of.* Time will be deemed of the essence of a contract, which gives a mere right of election to purchase real estate upon certain conditions. *Id.*

— *When made under a mistake, or in ignorance of a material fact, party entitled to relief in equity.*

See MISTAKE, 1.

— *Reformation of — what must be shown, to authorities.*

See REFORMATION OF CONTRACT.

— *In relation to bounties — when void as against public policy.*

See BOUNTIES.

— *Statute of frauds — Distinction between contract of sale, and one for work and labor to be performed.*

See STATUTE OF FRAUDS, 2.

— *Statute of frauds — Agreement to answer for the debt of another.*

See WATSON v. PARKER 613

— *Statute of frauds — An agreement by which A. is to perform work for B., for which payment is to be made after the death of B., is valid under the statute of frauds.*

See STATUTE OF FRAUDS, 3.

— *To work farm on shares — when does not create partnership.*

See PARTNERSHIP, 5.

— *For public work — § 38, Chap. 448, 1857 — when municipal officers have no authority to make — when should be made upon sealed bids.*

See McDONALD v. THE MAYOR, ETC., OF N. Y.

— *For public work — when made without advertising — void.*

See STATUTES, 4.

— *With R. R. Co. — When its president takes assignment of, from contractor — effect.*

See ULTRA VIRES, 3.

— *Void as against public policy.*

See PRINCIPAL AND AGENT, 4.

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- *When void as against public policy.*
See NICKELSON *v.* WILSON..... 615
- *Usage of trade — may be shown to explain meaning of a particular contract, but not to contradict its plain terms.*
See CUSTOM, 7.
- *Written — object of, may be shown by parol.*
See EVIDENCE, 4.
- *Measure of damages on breach of contract to purchase goods.*
See DAMAGES, 4.

CONVERSION — Pledge of stock.] A sale by a pledgee, without authority, or for non-compliance with a demand which the pledgee has no right to make, or after a tender of the debt for which the pledge is held, is a conversion. Plaintiff sued the defendants for the conversion of certain shares of bank stock, held by defendants as collateral security to a debt due them on account of gold purchased for plaintiff. The jury found that plaintiff had given an absolute order to the defendants to sell at 217, at which price they might have sold, but, claiming the order to be discretionary, they failed to do so, and the gold was subsequently sold at 207½. Plaintiff tendered a sum sufficient to pay the balance of the account, if the gold had been sold at 217. *Held*, that a sale, after such tender, was a conversion, and that plaintiff was entitled to recover the value of the stock sold, after deducting the actual indebtedness, for which it properly stood in pledge. *HOPE v. LAWRENCE*... 317

CONVICTION — May stand when judgment is reversed.

See CRIMINAL LAW, 5.

CORPORATION — Liability for contracts of its directors.] 1. The president and vice-president of the Novelty Iron Works, having full authority to employ such persons, as, in their judgment, were necessary in and about the business of the company, and the company having resolved to enter upon the business of manufacturing water meters, of the kind invented by one Van Duzen, *held*, that it was within the scope of their authority to secure a patent, in the name of Van Duzen, of his invention, and for this purpose, to employ plaintiff to counsel and advise the company in relation to the said meter, and to obtain a patent therefor, and that the corporation were liable for his services, rendered in pursuance of such employment.

POLLOK *v.* SHULTZE..... 324

2. — *Trustees of manufacturing corporation — failure to file a report — false report — §§ 12, 15, Chap. 40, 1848 — Demurrer — Misjoinder of causes of action.]* In a suit brought by a creditor of a mining corporation, created under the general act, chapter 40, Laws of 1848, against the trustees thereof, *held*, that causes of action, arising under section 12, for failure to file a report, and under section 15, for filing a false report, are properly united; each of them is for a liability somewhat in the nature of a statute penalty, and, virtually, is an action on contract for the recovery of money, and both of them arose out of the same transaction.

The first cause of action set out in the complaint was for a failure to file a report, as required by section 12; the second, for filing a false report in violation of section 15, alleged that the defendants made and filed "a certificate or report, a copy of which is hereunto annexed, marked B," and that the defendants signed the same, knowing it to be false; the copy of the certificate annexed to the complaint was not signed by all the defendants. *Held*, that a demurrer, on the ground that the causes of action, united in the complaint, did not affect all the parties to the action, was well taken; that the allegation that the certificate was signed by all the defendants must be considered as restricted and confined to what appears upon the face of the certificate, a copy of which was annexed to the complaint.

The third cause of action was for an alleged conspiracy, on the part of the defendants, to form the corporation, and that, by fraud and misrepresentations, the plaintiffs were induced to become creditors of the corporation. *Held*, that it was properly joined with the others, as they all related to the same general transaction. *BONNELL v. WHEELER*... 332

CORPORATION — *Continued.*

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3. — *Cause of action given by statute to creditor against trustees of, assignable.*] A cause of action against the trustees of a corporation, given by the statute to the creditors thereof for a violation of its provisions, is assignable, and may be enforced by the assignee of the debtor. *Id.*

— *Acts of officers of — when ultra vires.*

See **ULTRA VIRES**, 1.

— *Officers of — when not personally liable on contract made in its behalf, but signed by them individually.*

See **CONTRACT**, 10.

— *Foreign — jurisdiction of courts of this State over — Code, § 427.*

See **FOREIGN CORPORATIONS**.

— *Preferred stock — Dividends — payment of guaranteed — rights of stockholders.*

See **STOCK**, 1.

— *Receiver of — how appointed — Chap. 151, 1870.*

See **RECEIVER**, 1.

— *Sureties on draft drawn by — cannot interpose defense of usury.*

See **BILLS OF EXCHANGE**.

— *Village — water commissioners are agents of — village responsible for their acts — Duty of, in repairing streets.*

See **NEGLIGENCE**, 3.

— *Who proper party defendant in action against consolidated.*

See **ACTION**, 3.

COSTS — *When not allowed upon a certificate being made in pursuance of Chap. 535, 1864.*

See **TAXES**.

— *Lien of attorney for — when subject to right of set-off.*

See **ATTORNEY**, 2.

COUNTY JUDGE — *Order of arrest — may be granted by, though action is not triable in his county, and the attorney of moving party does not reside therein.*

See **ORDER OF ARREST**.

COURT — *Power of, in case of excessive damages.*

See **DAMAGES**, 3.

— *When has not power to grant stay of proceedings.*

See **STAY OF PROCEEDINGS**, 1.

COVENANT — *Of quiet enjoyment — Liability of landlord upon.*

See **LEASE**, 5.

CREDITORS — *When conditional sale sustained as against.*

See **CONDITIONAL SALE**, 2.

CRIMINAL LAW — *Larceny.*] 1. A treasury note, of the denomination of fifty dollars, was handed to the plaintiff in error, to take ten cents out of it, for the payment of a glass of soda-water; he appropriated the entire amount of the note to his own use. *Held*, that, upon proof of these facts, he could be convicted of larceny. **HILDERBRAND v. THE PEOPLE**..... 19

2. — *Return — Presumption from appearance of prisoner during trial.*] The return stated that the prisoner appeared in his own proper person, and was, in due form of law, tried and convicted. *Held*, that, as it nowhere stated that he left the court after he so appeared, the presumption is, that he remained and was present during the whole of the trial. *Id.*

3. — *Entry of judgment — not required to state what succeeded verdict and preceded sentence.*] The clerk's entry of the judgment pronounced, is not required to state what succeeded the verdict and preceded the sentence, and it need not appear from it that the prisoner was asked, before sentence, whether he had anything to say why the sentence should not be pronounced upon him for the offense of which he had been convicted. *Id.*

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4. — *Record required for review.*] To review the conviction and judgment in criminal cases, requires a formal judgment record to be made, signed and filed, and if that is not shown by the return to have been done, the court has nothing before it on which the case can be properly considered. *Id.*

5. — *Judgment reversed, conviction not.*] When a record is made, signed and filed as the statute prescribes, and it does not appear from it, that the inquiry, whether he had anything to say, was made of the defendant before he was sentenced, then it may be necessary, for that reason, to reverse the judgment pronounced, but not the conviction. *Id.*

6. — *Bill of exceptions — When criminal fugitive from justice, not entitled to have exceptions taken, reviewed.*] A person, convicted of a crime, who escapes from custody before sentence, and flees the jurisdiction of the court, thereby waives and suspends his rights to have exceptions, taken on the trial, reviewed by the appellate court, and such waiver and suspension can be avoided by him only by returning to the custody and judgment of the law.

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7. — *Statutory benefits.*] Such criminal cannot demand, as matter of right, the statutory benefits conferred on those who submit to the jurisdiction and judgment of the courts. *Id.*

8. — *Contempt.*] A party, in contempt of court, will not be permitted to ask a favor of the court, nor to take any aggressive proceedings against his adversary. *Id.*

9. — *Receiver of stolen goods — Scienter — what evidence of, allowed.*] Evidence of transactions of the prisoner, other than those connected with the offense charged, may be given for the purpose of proving guilty knowledge. COLEMAN v. THE PEOPLE 596

10. — *Declarations by prisoner — when their falsity may be shown.*] On the trial, the prosecution was permitted to give evidence of declarations of the prisoner, respecting collateral facts bearing more or less directly upon the question in controversy, and then to prove that such declarations were untrue — *held* not to be error. *Id.*

11. — *Bigamy — place of trial of — Trial cannot be had in county, where offense was not committed nor prisoner apprehended — 3 R. S. [5 ed.], 968, § 10.*] The plaintiff in error was indicted, tried and convicted of bigamy, in the Court of Sessions of Oswego county. The proof showed that the second marriage took place in Yates county, and that the prisoner was apprehended there; and the prisoner's counsel moved that the prisoner be discharged, as the offense was not committed, nor the prisoner apprehended, in Oswego county. *Held*, that the court erred in refusing to discharge the prisoner; the statute providing that, for a second or other marriage, the person committing such offense may be tried in any county in which such person may be apprehended.

COLLINS v. THE PEOPLE 610

12. — *Larceny — stolen property — identity of.*] The plaintiff in error was convicted of grand larceny, for stealing a quantity of pig-iron. The agent to whom the iron was sent to be sold, testified that it bore the marks, and presented the appearance of the iron in his possession, some of which had been taken away from the premises where it was deposited, and some from a boat, having a portion of it on board, during the night, in the early morning of which the defendant was arrested. He further testified that he identified the iron when he saw it in the following afternoon. *Held*, that his testimony, together with the fact that the iron was found in the defendant's boat, upon the river, at half-past three o'clock in the morning, and his subsequent statement that he had purchased it of a canal boat captain for fifteen dollars, when it was really worth fifty-two dollars, were sufficient to justify the submission of the identity of the property to the jury.

DILLON v. THE PEOPLE 670

13. — *Stolen property — presumption arising from possession of.*] The defendant's counsel requested the court to charge the jury that the mere possession of the property stolen was not *prima facie* evidence of the commission of the larceny by the defendant. The court declined so to charge. *Held*, no error. That the request must have been designed to relate to the

CRIMINAL LAW — Continued.

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defendant's possession, as that had been shown by the evidence, and that such possession was so recent and so suspicious, that it was consistent with no other rational conclusion than that of guilt. *Id.*

14. — *Stolen property — statement of prisoner as to how he obtained possession of — when must be proved false by prosecution.*] The defendant's counsel requested the court to charge that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, the prosecution was required to show the account to be false. The court declined so to charge. *Held*, no error. That the rule only applied to those cases in which considerable time has elapsed between the taking of the property and the discovery of the fact of possession, and where a reasonable account of how the prisoner came by the property was given to those finding him in possession; and that the account given by the defendant as to the manner in which he obtained possession of the iron, was, under the circumstances of the case, entirely unworthy of belief. *Id.*

— *Charge of judge at request of prisoner's counsel cannot be assigned as ground of error.*

See CHARGE, 1.

— *Rape — Virginity — immateriality of.*

See RAPE, 1.

— *Writ of error — motion to dismiss — fugitive from justice.*

See WRIT OF ERROR, 2.

— *Perjury — time stated in indictment for, when oath was administered, not material, so it be before finding of indictment and without statute of limitations.*

See INDICTMENT, 6.

— *Perjury — precise locality of commission of, need not be proved, as alleged.*

See INDICTMENT, 5.

— *Refusal to charge as to punishment of prisoner if convicted — correct.*

See CHARGE, 2.

CUSTOM — Evidence of.] 1. To render a custom obligatory, it must ordinarily be proved that it was known to the party to be bound thereby.

BOARDMAN v. GAILLARD 217

2. — *Of trade — what must be to render it valid and binding.]* To render a custom or usage of trade valid and binding, it must be known, certain, uniform, reasonable, and not contrary to law. BASSETT v. LEDERER 274

3. — *When unreasonable.]* Defendant proposed to prove that it was a custom among merchants, to sign the receipts presented by carmen with goods, without any inquiry, on the part of the receiving clerk or porter, as to the ownership of the goods, or the place from which they were received. *Held*, that the evidence was properly excluded; that the custom proposed to be proved, was entirely unreasonable, as it placed the consequence of one person's negligence and inattention upon another in no way connected with him, having no control over his conduct, and for whose acts he could be in no proper sense responsible. GALLUP v. LEDERER 282

4. — *General — can alone be proved.]* Defendant was asked whether, at the time of the sale, there was a custom among brokers to sell goods in their own name and receive pay therefor. *Held*, that the evidence was properly excluded. It was not proposed to prove a general custom upon that subject, but simply a custom of brokers, which might very well be unknown to all other persons. *Id.*

5. — *When valid — Long continuance or general application of.]* To render a custom valid and binding upon a party to a transaction included within it, the proof should show it of such long continuance, or general application, as reasonably to warrant the conclusion that it was known to the party designed to be affected by it, or that he had actual knowledge or notice of its existence. *Id.*

6. — *Is a fact, not opinion as to law.]* Where a custom is to be proved, the inquiry is not after the opinions of traders and merchants in respect to the law upon a mercantile transaction, but for the evidence of a fact, to wit,

CUSTOM — *Continued.*

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the usage or practice, in the course of mercantile business, in the particular case. *Id.*

7. — *Of trade — when may be shown, to explain contract.*] A usage of the trade in which a contract is made, may be shown, to explain the meaning of a particular contract, but not to contradict its plain terms.

BAKER v. SQUIER 449

— *Evidence of, not admissible to vary terms of special contract.*

See EVIDENCE, 10.

— *Evidence as to a custom of a board of supervisors, to allow its members certain sums for services on committees, when inadmissible in an action relating to such services.*

See EVIDENCE, 18.

— *In conflict with statute cannot be proved.*

See EVIDENCE, 18.

DAMAGES — *Agent — when liable for sale of principal's property.*] 1. In an action brought to recover damages for the wrongful sale and conversion of a large amount of real estate, owned by the plaintiff and sold by the present defendants as his agents, *Held*, that the defendants were not liable for any error of judgment on their part, or for injudiciously making the sale in order to avoid the effect of an attachment law taking effect the next day, under which the plaintiff's non-resident creditors could attach and seize his property, but that they could only be held liable for designedly selling his property for their own benefit, for the purpose of depriving him of the benefit of it. PRICE v. KEYES 177

2. — *Servant — liability of principal for negligence of.*] An action was brought to recover damages for injuries to plaintiff's wife and son, and to his carriage, by a collision alleged to have occurred through the negligence of defendant's servant. At the trial, the defendant introduced evidence to show that he was not the owner of the horses and carriage which had caused the injury, nor the master of its driver. The judge, having left to the jury the question of the ownership of the horses and carriage, was requested to charge "that if they find the coachman was not the servant of the defendant, but was in the employ of Mrs. Hunt (one of the occupants and the alleged owner of the carriage), they cannot find for the plaintiff," and declined so to charge. *Held*, that his refusal so to do was error. The liability of the defendant depended entirely upon the fact that the coachman was his servant, and the question of the ownership of the carriage and horses, was only material as it tended to prove or disprove this fact. SLOANE v. ELMER 310

3. — *Excessive — in action of tort — Remedy.*] In an action of tort, the court cannot reduce the verdict of a jury, because it is deemed excessive. The only remedy in such a case, is to set it aside and order a new trial.

SLOAN v. N. Y. C. & H. R. R. Co. 540

4. — *Measure of, on breach of contract to purchase goods.*] Plaintiff agreed in writing to purchase from defendant 200 tons of ice. He ordered and received and paid for two loads, and then gave defendant notice that the ice was not good and merchantable, and that he would not take the residue. Plaintiff kept the ice for defendant till it was worthless. The referee found that the ice was merchantable, and that plaintiff was entitled to recover for the ice not paid for, following, as to the measure of damages, *Dustan v. McAndrew et al* (44 N. Y., 72). SCHOONMAKER v. REED. 611

— *For negligence of horse-railroad conductor.*

See NEGLIGENCE, 1.

— *License by a R. R. Co. to cross its private grounds — liability of company under.*

See RAILROAD Co., 1.

— *In action in affirmance of contract — measure of.*

See SALE, 4

— *Measure of.*

See SLAWSON v. ALBANY RAILWAY Co. 490

DAMAGES — *Continued.*

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— *Husband and wife must join in action for occupation of and damages to lands owned by them jointly.*

See HUSBAND AND WIFE, 1.

DEATH — *Of party pending appeal — Effect of.*

See PRACTICE, 2.

DEBTOR — *Assignment to creditor for benefit of.*

See FRAUDULENT CONVEYANCE.

DECREE — *Of absolute divorce — when court has no power to open.*

See DIVORCE, 1.

DEFAULT — *Judgment on.*

See JUDGMENT, 1.

— *Order made by, not reviewable.*

See APPEAL, 2.

DEFENSE — *New matter constituting, must be set up in answer — Chapter 281, 1833.]* 1. Where a defendant wishes to defeat a recovery by the plaintiff, on the ground that the contract, upon which he sued, is illegal, being in violation of the act requiring that the designation, "& Co." shall represent an actual partner, the necessary facts must be alleged in the answer, as well as proved upon the trial. *O'TOOLE v. GARVIN*..... 93

2. — *Power of court to compel defendant to elect between inconsistent defenses.]* This action was brought to recover the price of barley, sold and delivered by the plaintiffs to the defendants. The defendants set up a warranty and a breach thereof, and that they were induced to purchase the barley by means of fraudulent representations, made by a person having charge of its sale for the plaintiffs, by which they had sustained damages, and for which they claimed an allowance. After the defendants rested, the court, upon the application of the plaintiffs' counsel, compelled them to elect upon which of their two defenses they would proceed. *Held*, that this was error. The court has no power to require defendants to elect upon which of their defenses they will rely, where more than one is set forth in the answer, and evidence is given to prove their truth, unless they are so far inconsistent that they cannot properly coexist in the same transaction. *KELLY v. BERNHEIMER*..... 112

3. — *Fraud — Evidence.]* Defendants, in support of their allegations as to fraud, offered to prove statements of Tilden, who acted as plaintiffs' agent in selling the barley, made just before the sale, while the barley was being changed from the vessel in which it was loaded to the lighter, as to its quality, and that these statements were afterward communicated to the defendants, and acted upon by them; the court excluded the evidence. *Held*, that this was error. *Id.*

— *Defective performance.*

See PERFORMANCE.

— *Equitable — when may be set up to legal action.*

See PARTNERSHIP, 7.

DELIVERY — *When title vests by.*

See CONDITIONAL SALE, 1.

— *Of chattel mortgage, when property is in possession of third person.*

See CHATTEL MORTGAGE, 1.

DEMURRER — *To answer, in action for fraud, denying fraud, and setting up matters showing absence of intent to defraud — when overruled.*

See ANSWER, 1.

— *When not frivolous — complaint in action against indorser — what must be alleged in.*

See PROMISSORY NOTE, 13.

DIRECTORS — *Liability of corporation for contract of.*

See CORPORATION, 1.

DIRECTORY — <i>Statutes, when.</i>	PAGE
<i>See</i> STATUTES, 9.	
— <i>Provision of Code as to entry of judgment within four days after filing decision, is.</i>	
<i>See</i> FORECLOSURE, 2.	
DISCONTINUANCE OF ACTION — <i>When submission to arbitration operates as.</i>	
<i>See</i> ARBITRATION.	
DISCRETION OF COURT — <i>Right to serve supplemental complaint rests in.</i>	
<i>See</i> SUPPLEMENTAL COMPLAINT.	
— <i>Whether an amendment to a pleading should be allowed or not, is in the.</i>	
<i>See</i> PLEADINGS, 3.	
DIVIDENDS — <i>Payment of guaranteed — rights of stockholders.</i>	
<i>See</i> STOCK, 1.	
DIVORCE — <i>Absolute — when court has no power to open decree of — Code, § 135, sub. 5.]</i> 1. The court has no power to open a decree, granting an absolute divorce, upon proof that defendant did not receive any copy summons or notice of publication, and upon affidavits showing a defense.	
Section 135, subdivision 5, of the Code, deprives the court of this power.	
<i>BROWN v. BROWN</i>	443
2. — <i>Limited — the fact that husband and wife cannot live together harmoniously, not ground for legal separation.]</i> The fact that there is no possibility of a husband and wife living together in harmony, is not ground for a legal separation.	
In such case the parties must be left to bear, as they may, the inconveniences and griefs resulting from their want of harmony and mutual quarreling. <i>DAVIS v. DAVIS</i>	444
3. — <i>Limited — Maintenance of wife — how secured — order for, under R. S., § 55 — when made.]</i> By the provisions of the Revised Statutes, the court is not authorized to take possession of the property of the husband through the medium of a receiver, in the first instance, but to require security for the payment of the allowance, and to sequester his property only in the event of his neglecting to give security, or upon his default after security has been given.	
An order for the maintenance and support of the wife, under section 55, cannot be made, unless one of the three grounds upon which the statute authorizes a limited divorce, be established in the case. <i>Id.</i>	
— <i>Alimony — not affected by subsequent remarriage of wife.</i>	
<i>See</i> ALIMONY.	
DOGS — <i>Liability of owner of, for injuries to sheep — evidence.]</i> Action to recover for damages sustained by the killing and wounding of plaintiff's sheep by a dog of defendant. At the trial, it appeared that two dogs were engaged in killing and wounding the sheep, one of which was owned by a Mr. McCarthy, the other, as it was alleged, belonging to the defendant. Upon the defendant's cross-examination, he was asked whether he had killed the dog since the former trial of the cause; <i>held</i> , that the question was proper; that in the absence of evidence as to the cause of killing, it might be inferred that the dog was killed to destroy proof of his identity, or that defendant believed that he had killed the sheep, and killed him to prevent further loss.	
At the trial, McCarthy was allowed to testify that he, at one time, saw a dog resembling the defendant's, in his (McCarthy's) orchard, in company with his own dog. <i>Held</i> , that the evidence was properly admitted, as it tended to show that the dogs were known to each other, and, on one occasion, at least, were in company, thereby laying the basis for a presumption, that when a feast was to be had upon plaintiff's sheep, they would enjoy it together.	
<i>CARROLL v. WEILER</i>	605
EASEMENT — <i>What constitutes — may be imposed by covenant.]</i> The owner in fee of land may impose upon it any burden, however injurious or	

EVIDENCE — Continued.

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should have been questioned in regard to them, and allowed to explain them, on his examination. *Held*, that this was error; that "the omission to present the letter to the testator when he was examined as a witness, did not prevent it from being afterward proved and read in evidence on the trial of the action." "No principle of evidence requires a party to prove and authenticate his documentary evidence by any particular person, unless he be a subscribing witness to it." *ENGLISH v. STEELE*. 716

25. — *Memorandum — Parol evidence of contents of, inadmissible.*] The plaintiff and defendant entered into an agreement for the exchange of certain property, whereby the defendant was, among other things, to deliver seven horses to the plaintiff. One of the horses having died, before its delivery, it was agreed that the defendant should deliver another horse; or, in case of her failure so to do, that she should pay the plaintiff \$300, though the latter alternative was denied by the defendant. This action was brought upon the second agreement.

Upon the trial, the plaintiff testified, that, before entering into the contract of exchange, a memorandum was made of the defendant's property, each item thereof being valued, which memorandum was the basis of the exchange. He then testified, against the defendant's objection and exception, that the horse which died, was set down therein at \$300. *Held*, that this was error; that the memorandum was the best evidence of its own contents, and that it should have been produced or accounted for. *BERRIAN v. SANFORD*. 625

26. — *Statement of person to whom witness has been referred by plaintiff for information — When admissible.*] Action to recover the damages sustained by the plaintiff in consequence of the unlawful taking of her property by the defendants. The principal dispute was as to the value of the goods. A witness, called by the defendants, was asked as to a conversation had by him with Charles Wehle, the brother and attorney of the plaintiff, soon after the taking of the goods, in relation to the amount of stock. The conversation was objected to by the plaintiff and excluded. The defendants then offered to prove that the witness was referred by Mrs. Wehle to her brother, as to the fact of how many goods were in the store, which evidence was objected to by the plaintiff and excluded. *Held*, that the rejection of the evidence was error. *WEHLE v. SPELMAN*. 634

— *Admissions — when admissible in.*

See LEASE, 4.

— *Of qualification of agency — when allowed.*

See AUTHORITY.

— *Statements — when admissible.*

See DEFENSE, 3.

— *Of custom.*

See CUSTOM, 1, 2, 3, 4, 5.

— *Of fraud — statement of agent may be proved to show.*

See DEFENSE, 3.

— *Contract — custom of trade may be shown to explain meaning of, but not to contradict its plain terms.*

See CUSTOM, 7.

— *Declarations by a prisoner as to collateral facts — when their falsity may be shown.*

See CRIMINAL LAW, 10.

— *In action against owner of dog, for injuries to sheep.*

See DOGS.

— *Of pain and suffering, in an action for injuries sustained — when admissible.*

See HUSBAND AND WIFE, 3.

— *Memorandum — one portion of admissible to contradict another.*

See MEMORANDA, 2.

— *Referee — duty of, in reserving decision as to admission or rejection of evidence.*

See REFEREE, 3.

EVIDENCE — *Continued.*

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- *Power of referees to receive and reserve his decision as to objections to.*
See REFEREE, 1.
- *What not allowed to impair statement of witness.*
See WITNESS, 1.
- *Silence of party — evidence of truth of statements made to him.*
See PRINCIPAL AND AGENT, 7.
- *Tending to show different cause of action from that alleged in complaint, inadmissible.*
See BOUNTIES.
- *Agreement to divide profits of farm, worked on shares — The question, "during the whole term, was there a profit made or loss sustained in the general result; state all the facts," held to be too general, and that the objections to the first part of it were sufficient to authorize its rejection as an entire question.*
See PARTNERSHIP, 5.
- *Prior conversations between thief and receiver of stolen goods.*
See INDICTMENT, 1.
- *Newly-discovered, when ground for a new trial.*
See NEW TRIAL, 1.
- *Power of referees to receive, and reserve his decision as to admissibility of.*
See REFEREE, 1, 3.
- *Of good character.*
See SALE, 2.
- *Expert — opinion of, when admissible.*
See EXPERT.
- *(Onus probandi — as to funds in hands of commissioners of highways for repairing bridges.*
See COMMISSIONERS OF HIGHWAYS, 3.
- *Admissions of one member of a board of trustees — admissibility of.*
See LEASE, 4.
- *Larceny — Statement of prisoner as to how he obtained possession of stolen property — when must be proved false by prosecution.*
See CRIMINAL LAW, 14.
- *False testimony — effect when given willfully.*
See RAPE, 3.

EXAMINATION BEFORE TRIAL — *Evidence — contempt.*

See EVIDENCE, 1.

EXCEPTIONS — *Modes of reviewing them.*] 1. Where exceptions are taken at the trial, the Code has provided three different modes of reviewing them: by an appeal from the judgment; by a motion for a new trial upon them at the General Term, when the judge before whom the cause was tried directs that they be heard in the first instance at the General Term; and by a motion for a new trial at the Circuit or Special Term. PRICE v. KEYES..... 177

2. — *New trial.*] The Special Term cannot hear a motion for a new trial, while an order, directing the exceptions to be heard in the first instance at the General Term, continues in force. *Id.*

3. — *How stated in bill of.*] If an exception be taken on substantially the same state of facts, and on the same point, more than once, a single statement of it is all that is proper in a bill of exceptions. TWEED v. DAVIS..... 252

- *Specific, must be taken on objection.*
See REFERENCE, 5.
- *Bill of — when and by whom settled.*
See BILL OF EXCEPTIONS, 5.
- *Motion to quash indictment — denial of, not proper subject of exception.*
See INDICTMENT, 3.

EXCESSIVE DAMAGES — *In action of tort — Remedy.*

See DAMAGES, 3.

EXECUTION — *Exemption* — *Chap. 157, 1842 — when property specified in, not exempt.*] 1. All the articles specified in chapter 157, of the Laws of 1842, are liable to seizure and sale on an execution issued to collect the purchase-money of any one of the articles therein specified, or of any other property, which was, at the time of the passage of said act, exempt from execution.

SNYDER v. DAVIS 350

2. — *Direction on—when sufficient.*] An execution was issued and delivered to the sheriff of Saratoga county, in the usual form, except that, on the inside, it was directed "To the sheriff of the county of county;" on the outside, under the title of the action, were the words, "execution to Saratoga county," with the usual directions to levy, etc. *Held*, that its direction to the sheriff of Saratoga county, sufficiently appeared. WHITE v. COULTER... 357

— *Levy on "right, title and interest" in property, in which judgment debtor has no interest — sufficient to sustain action of replevin.*

See LEVY.

EXECUTOR — *Accounts of— Claim against estate by.*] 1. The executor presented a claim against the estate, for money paid and advanced for divers family expenses, such as rent and other necessities, and for expenses in taking the testator to the asylum, and for his clothing, nursing and medical attendance, amounting to \$371. The surrogate refused to allow the claim, as all of the disbursements were made during the lifetime of the testator. *Held*, that the claim should have been allowed. IN MATTER OF CUNNINGHAM, 214

2. — *Accounts of—objections to, must be stated in the form of specific allegations, and proof thereof given.*] The defendant obtained an order from the surrogate of the county of Queens, requiring the plaintiff to render his account, as executor, and show cause why the claim of the defendant, founded upon a judgment docketed against the plaintiff's testator during his lifetime, should not be paid. An account, duly verified by the plaintiff, with the proper vouchers, was thereupon filed with the surrogate, showing a balance of \$9.36 in his hands, applicable to the payment of the defendant's claim. At the hearing before the surrogate, the defendant urged that a large part of the expenditures mentioned in the account was not necessary for the settlement and preservation of the estate, and objected specifically to several items. No proofs of any kind were taken, save the account and vouchers, nor was the executor examined. Subsequently, the surrogate made an order, directing payment of the defendant's claim, \$724.91. *Held*, that, as it nowhere appeared that the surrogate passed upon the items objected to, allowing or disallowing them, and as the verified accounts of the executor, with vouchers for all the payments, raised the presumption that the payments were properly made, and, as it rests with the party objecting to establish more assets than are acknowledged by the account or inventory, the order was improperly granted, and should be reversed.

The proper practice is to state the objections in the form of distinct and specific allegations, and give proof thereof, and this applies to all objections.

BAINBRIDGE v. McCULLOUGH 468

— *Action on individual claim as.*

See PRACTICE, 1.

— *Demand against.*

See SET-OFF, 1.

EXEMPT — *Property, from execution — when articles specified in statute are not.*
See EXECUTION, 1.

EX PARTE — *Referee will not be appointed to take affidavit for ex parte motion.*

See REFERENCE, 7.

EXPERT — *Opinion of.*] This action was brought to recover for materials and work, furnished and performed by the plaintiff in repairing defendant's house. At the trial, defendant attempted to prove the condition of the premises, immediately previous to the time the work was performed. *Held*, that the evidence was properly excluded, as irrelevant and immaterial. A

EXPERT—*Continued.*

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witness, called by defendant, was asked by him, how many days it would take, in his opinion, to perform the work set out in the bill of particulars. *Held*, that the evidence was properly excluded, because it did not appear that the witness had examined the work done for the purpose of estimating the number of days' work required to perform it. *HADDEN v. HOUGHTALING*... 818

EXTRA ALLOWANCE—*Power of court to grant.*] The Supreme Court has power, under section 818 of the Code, to grant an allowance in appeals from the Surrogate's Court, nor is this power affected by the fact that an allowance has already been granted in the case by the Surrogate.

The case of *Seguine v. Seguine* followed, and distinguished from the cases of *Wolfe v. Van Nostrand* and *The People v. The N. Y. Central R. R. Co.* The latter cases hold that appellate courts cannot grant the allowance, because the statute gives the same, by way of indemnity, for the expense of the trial in the courts of original jurisdiction. But, by section 818 of the Code, the appellate court is, *pro hac vice*, made the court of original jurisdiction.

DUPUY v. WURTS..... 119

EXTRADITION TREATY—*Fugitive from justice—surrender of, under treaty—rights of.*] 1. Where a fugitive from justice is surrendered under an extradition treaty, it is for the single and special purpose of being tried for the crime, mentioned in the proceedings taken against him, and for none other. As to all other matters, he is entitled to the protection of the laws of the country surrendering him, so far as his personal liberty would have been secured by them, in case no removal of his person had been made. And, after the purposes of justice are satisfied, as to the particular offense for which he was surrendered, he is entitled to return to the country from which he was taken.

See BACHARACH v. LAGRAVE..... 689

2. — *Fugitive, surrendered under—when cannot be arrested in civil action.*] A person who has been surrendered under an extradition treaty, is not, while in the custody of the government to which he has been delivered up, and for a reasonable time thereafter, subject to be arrested in a civil action. *Id.*

3. — *Fugitive, surrendered under—Motion to vacate order of arrest—giving bail is not waiver of right to make.*] The defendant, who had been brought into the United States as a fugitive from justice, under the extradition treaty with France, was arrested in a civil action. After such arrest, he gave bail and was discharged. *Held*, that by so doing, he did not waive his right to apply to the court to have the order of arrest vacated, on the ground that he was not, under the circumstances, liable to be arrested in such action. *Id.*

FACT—*Custom is a.*

See CUSTOM, 6.

FALSE REPRESENTATIONS—*When a defense.*

See PROMISSORY NOTE, 1.

— *When not alleged in complaint, proof of, not allowed at trial—Fraudulent intent—what admissible as evidence of.*

See EVIDENCE, 11, 12.

— *When transfer of property by wife to husband set aside because of.*

See HUSBAND AND WIFE, 4.

— *By agent purchasing principal's property.*

See PRINCIPAL AND AGENT, 1.

— *See FRAUDULENT REPRESENTATIONS.*

FAMILY NAME—*Right to use of.*

See TRADE-MARK.

FELONY—*Note given to compromise—bona fide owner of.*

See PROMISSORY NOTE, 11.

FENCES — *Division fence — what, adjoining owners required to build.*] The law does not require each party to build one-half the fence, but a "just and equal proportion of the division fence;" that is, just and equal with reference to the cost of construction and maintenance. *PEOPLE v. DEWEY*..... 529

FENCES — *Duty of railroad company to maintain.*

See NEGLIGENCE, 4.

FENCE-VIEWERS — *Question of their jurisdiction only, and not their decision, will be considered on certiorari.*] The provisions of the Revised Statutes, make the decision of the fence-viewers final, and, on certiorari, the court is restricted to the consideration of the question of jurisdiction, and will not presume facts to exist, which take away their jurisdiction. *Id.*

FIDUCIARY CAPACITY — *When money received in.*

See ARREST, 1.

FORECLOSURE — *Sale on — when not set aside — order denying motion to set aside, not appealable.*] 1. A motion to set aside a sale on foreclosure is addressed to the discretion of the court below, and, in the absence of abuse of such discretion, the order of the Special Term is not appealable. Where property, the market value of which, on the day of sale, was not above \$40,000, was bid in by the mortgagee for \$35,000, the mortgagor having notice that he would not bid above that for it, and there was no pretense of fraud, misconduct or surprise, a resale should not be granted.

WHITE v. COULTER..... 47

2. — *Judgment of — entry of, within four days after filing decision — provision of Code as to, directory.*] Where a judgment of foreclosure, in an action tried before the court, without a jury, was entered within four days of the filing of the decision; *held*, that the defendant, by consenting to the entry, and subsequently allowing the sale to be confirmed, waived the irregularity, if any existed. This provision of the Code is so far directory, that a neglect of it will not be considered, in the absence of wrong or injury to the defendant. (*Per BOARDMAN, J.*) *Id.*

3. — *Wife of mortgagor — failure to serve summons on — effect of.*] Whether, in an action to foreclose a purchase-money mortgage, service of the summons upon the husband is not good as to the wife, and whether she will not be bound by the judgment entered therein, *quere*. But, if such service does not bind the wife, then her rights are not foreclosed; and, if she shall survive her husband, whereby her inchoate right of dower would ripen into an absolute right in the equity of redemption, she may then take proceedings to enforce her rights, and will not be bound by a judgment to which she was not a party. But such non-service furnishes no ground for an application to set aside the judgment, during the lifetime of the husband. *Id.*

4. — *Surplus money — when party whose mortgage is first recorded is entitled to.*] Cambrelling being attorney for Mrs. Sherwood and Mrs. Babcock, in 1868 executed a mortgage to the latter, but did not record it. In 1869, he executed a mortgage on the same property to Mrs. Sherwood, and this mortgage was recorded. *Held*, that the party whose mortgage was recorded was entitled to the surplus money. *HOPE FIRE INS. CO. v. CAMBRELLING*... 33

5. — *By advertisement. Notice of sale — requirements of.*] In foreclosure by advertisement, if the notice of sale gives to the public the means of ascertaining the facts, required to be stated in the notice of sale, by accurate reference to the record of the mortgage in the clerk's office, it is enough; and a strict conformity to the provisions of the statute, is not essential to the validity of the foreclosure. *CANDEE v. BURKE*..... 546

6. — *Surplus money — Effect of receipt of, by mortgagor.*] The receipt of surplus money on a foreclosure sale by the mortgagor or his representatives, does not estop the party from questioning the validity of the sale, though it is evidence to be considered in passing on the question of the regularity of the proceedings. *Id.*

7. — *Foreclosure sale — Action to set aside — purchaser, a necessary party.*] The purchaser at a foreclosure sale is a necessary party to any action to have the sale declared void. *Id.*

FOREIGN CORPORATIONS — *Jurisdiction of the courts of this State over — Code, § 427.*] The provisions of section 427 of the Code of Procedure, relating to actions against foreign corporations, do not limit the jurisdiction of the courts of this State to cases in which the cause of action has arisen, or the subject, or some property to be acted upon, is situated within the State. *PROUTY v. MICH. SO. & N. IND. R. R. Co.* 653

FOREIGN LAWS — *Bankrupt laws — when courts of this State will not recognize right or title acquired under.*] The courts of this State will not recognize or enforce a right or title acquired under foreign bankrupt laws, or foreign bankrupt proceedings, so far as affects property within their jurisdiction, or demands against residents of the State. There is no distinction, in this respect, between the cases of voluntary and involuntary bankruptcy. The plaintiffs were trustees in bankruptcy of the firm of Sichel & Co., the members of which firm were residents, and subject to the laws of the kingdom of Belgium, and were adjudged bankrupts in proper proceedings for that purpose in the Tribunal of Commerce, of the city of Brussels. As such trustees they claim to recover the value of certain property alleged to have been fraudulently obtained from the said bankrupts. At the trial the plaintiffs were nonsuited. *Held*, that this was proper, as the complaint did not state facts sufficient to constitute a cause of action. *MOSELMAN v. CAEN* 647

FOREIGN STATUTES — *Cannot for the first time be read on the hearing of an appeal.*
See *PROUTY v. MICH. SO. & N. IND. R. R. Co.* 653

FRAUD — *Answer in action for, denying fraud, and setting up matters showing absence of intent to defraud, sustained on demurrer.*
See *ANSWER*, 1.

— *Of mortgagor — when will not affect rights of mortgagees.*
See *CHATTEL MORTGAGE*, 3.

— *In making of contract, entitles party to recover money payments, made upon it.*
See *CONTRACT*, 8.

FRAUDULENT CONVEYANCE — *Debtor — assignment of property to creditor for benefit of — Recovery in such cases — amount of — by receiver.*] When the evidence shows that the debtor transferred property to his creditor not only to pay the debt due him, but for the purpose of preventing his other creditors from appropriating any part of it to the payment of debts due themselves, *held*, that the creditor should be required to pay over all the property received in excess of his claim. *PALEN v. BUSHNELL* 319

— *When conveyance by trustee to cestui que trust is fraudulent as to creditors.*
See *STATUTE OF USES AND TRUSTS*.

FRAUDULENT INTENT — *What admissible as evidence of.*
See *EVIDENCE*, 12.

FRAUDULENT REPRESENTATIONS — *When not alleged in complaint cannot be proved on the trial.*
See *EVIDENCE*, 11.

— *Active vigilance not required in discovery of.*
See *PRINCIPAL AND AGENT*, 8.
— *See FALSE REPRESENTATIONS.*

FRAUDULENT STIPULATION — *Motion to set aside.*
See *STIPULATION*, 1.

FREIGHT — *Liability of warehouseman for charges on freight stored with him by common carrier.*
See *WAREHOUSEMAN*.

FUGITIVE FROM JUSTICE — *Effect of convict's escape.*
See *WRIT OF ERROR*, 2.
— *Not entitled to have exceptions taken, reviewed.*
See *CRIMINAL LAW*, 6.

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— *Rights of, when surrendered under extradition treaty--when cannot be arrested in civil action.*

See EXTRADITION TREATY, 1, 2, 3.

GENERAL DENIAL—*What evidence admitted under.*

See PLEADINGS, 2.

GENUINENESS—*Of paper—what evidence of admissibility.*

See EVIDENCE, 16.

GRAND LARCENY—*Stolen property—identity of—presumption arising from possession of—Statement of prisoner—when must be proved false by prosecution.*

See CRIMINAL LAW, 12, 13, 14.

GUARANTY—*When void because consideration is not expressed in it.*

See PROMISSORY NOTE, 12.

— *Of promissory note—in action on, insolvency of maker of the note may be shown.*

See PROMISSORY NOTE, 12.

HABEAS CORPUS—*Res adjudicata.*] One Friedlander, who was in the custody of the sheriff, under an execution issued against his person in favor of Eldridge and others, applied to Mr. Justice FANCHER, on *habeas corpus*, to obtain his discharge. The sheriff, in his return, alleged that a writ of *habeas corpus* had previously been granted by Mr. Justice ROBINSON, on the application of the said Friedlander, and that the judge had then decided that he was not entitled to his discharge, and that the adjudication was made on the same facts, on which he now asks his discharge in this proceeding. To this return, the prisoner put in a traverse, denying, as a matter of fact, that the case, as then presented, had been presented to, and passed on by Judge ROBINSON. To this the sheriff demurred. *Held*, on the demurrer, that the case was not *res adjudicata*. PEOPLE v. FANCHER.....

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HEIRS—*The word "heirs"—distinction between the meaning of, when used in devises, and when used in bequests.*

See WILL, 10.

HUSBAND AND WIFE—*Must join in action for occupation of, and damages to, lands owned by them jointly.*] 1. Plaintiff brought this action to recover for the occupation of certain land, and for waste committed thereon. Upon the trial, it appeared that the title to the land was in the husband and wife, jointly. *Held*, that she could not recover; that both must join in the action.

FREEMAN v. BARBER..... 439

2. — *Right of husband to recover for injuries sustained by wife.*] Where a wife is injured by the negligence of a common carrier of passengers, the husband is entitled to recover for the loss of her services resulting therefrom. SLOAN v. N. Y. CENTRAL AND HUDSON R. R. Co..... 540

3. — *Evidence of pain and suffering—when admissible in action by husband for injuries sustained by wife.*] In an action brought by a husband, to recover for the loss of services of his wife, resulting from injuries sustained by her, evidence of her pain and suffering is admissible to prove the extent of the injuries and the duration of the loss of her services. *Id.*

4. — *Transfer of property by wife to husband—when set aside because of false representations.*] A transfer of property, made by a wife to her husband because of representations that a debt, in reality due by the husband, could be enforced against and collected out of such property, when such was not the fact, will be set aside by a court of equity.

BOYD v. DE LA MONTAGNE..... 606

— *Failure to serve summons on wife in foreclosure suit—effect of.*

See FORECLOSURE, 3.

— *Maintenance of wife—how secured in case of limited divorce—order for, under R. S., § 55—when made—Court not authorized to take possession of husband's property by a receiver, in the first instance.*

See DIVORCE, 3.

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INCOME — *Accumulation of.*
See WILL, 8, 9.

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INDICTMENT — *Stolen goods — receiver of — Former transactions between thief and receiver of.*] 1. On the trial of an indictment, charging the offense of receiving stolen goods, conversations, had between the accused and the thief on former occasions, when the accused had received from him goods similar to those described in the indictment, are admissible in evidence as tending to show guilty knowledge on the part of the receiver.

COPPERMAN v. PEOPLE 15

2. — *Receiver of stolen goods — Notice — evidence of.*] A charge of the judge, that it was material for the jury to determine whether the transaction was a sale or pledge, was correct; as, if it was the former, if the sum paid were very much less than the real value of the goods, it would be material on the question of notice. *Id.*

3. — *Motion to quash — denial of, not proper subject of exception.*] After pleading not guilty to the indictment, the plaintiff in error moved to quash the indictment; the motion was denied and an exception taken. *Held*, that the motion was addressed to the discretion of the court, and was not a proper subject of exception. **WOOD v. PEOPLE** 381

4. — *Conviction sustained, where offense sufficiently assigned in any one count of.*] Where the offense is sufficiently assigned in any one count in the indictment, the remainder may be rejected as surplusage, and the conviction sustained. *Id.*

5. — *Perjury — Precise locality of commission of offense, not matter of description, and need not be proved as alleged — Courts take judicial cognizance of statutes creating counties, towns, etc.*] The indictment alleged that the court was held at the town of Kingsbury, and that the perjury was committed at the village of Sandy Hill. *Held*, that the indictment was sufficient, as it was alleged in each count that the court was held, and the perjury committed, in the county of Washington; that the precise locality is not matter of description, and need not be proved as alleged; *held*, further, that the courts take judicial cognizance of the statutes of the State, whereby counties, towns, etc., are created, and thus know that the village of Sandy Hill is in the town of Kingsbury. *Id.*

6. — *Perjury — time stated in indictment, when oath was administered, immaterial.*] In an indictment for perjury, the time stated therein when the oath was administered is not material, so it be before the finding of the indictment and within the statute of limitations. *Id.*

INFANTS — *Not liable in tort for breach of contract — Acts of — when sufficient to constitute a trespass.*] To render an infant, who has hired a horse, liable in an action of trespass, he must do some willful and positive act which amounts to an election on his part to disaffirm the contract; a bare neglect to protect the animal from injury, and to return it at the time agreed upon is not sufficient. If he willfully and intentionally injure the animal, an action of trespass will lie against him for the tort, but not if the injury complained of occurred in the act of driving the animal through his unskillfulness and want of knowledge, discretion and judgment.

MOORE v. EASTMAN 578

INJUNCTION — *Contempt for violation of — duty of referee in proceeding to punish for, as to determining injury sustained by violation of injunction.*] 1. Where, in a proceeding instituted to punish one G. for contempt, for violating an injunction issued in this case, the order of reference, after reciting that the motion to punish the defendants for contempt came on to be heard, thus proceeds. "It is ordered that this proceeding be and the same is hereby referred to Henry J. Cullen, Esq., a counselor of this court, to take testimony in regard to the same, and report with all due speed to this court his opinion thereon." *Held*, that it was the duty of the referee, under such order, to take proof as to, and to determine the extent of, the loss and injury which the plaintiff had suffered by the violation of the injunction.

HARTEAU v. DEER PARK STONE Co. 498

2. — *To prevent summary proceedings — when will not be granted.*] The court will not grant an injunction preventing a landlord from instituting

INJUNCTION — *Continued.*

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summary proceedings against his tenant, on the ground that the landlord has extended the tenant's lease. The question of the extension of the lease, is one that can be properly determined in the summary proceedings.

RAPP v. WILLIAMS 716

8. — *Usurious loan — sale of collaterals — when restrained.*] This court will continue an injunction granted to restrain a party from selling securities pledged as collateral to a loan, the complaint averring, and the answer denying, that the contracts in relation to commissions were designed to be, and were mere covers for usury, when it appears that, in addition to seven per cent for interest, and all expenses and disbursements attending the care and custody of the collaterals, and eight per cent on the gross proceeds of a sale, if one should be made, a sum, equal to twenty-four per cent per annum on the loan, is charged for the care and custody of the bonds and stock certificates pledged, and this, under an agreement which devolves all risk of loss on the borrower. It is impossible to say that the jury would not be justified in finding that this transaction was a cover for usury.

CALDWELL v. COMMERCIAL WAREHOUSE CO. 718

— *To prevent use of family name as trade-mark — denied.*
See TRADE-MARK.

— *When will not be granted, to restrain transfer of promissory note.*
See PROMISSORY NOTE, 7.

INJURY — *To wife — husband may recover for loss of services of wife.*
See HUSBAND AND WIFE, 2.

INSURANCE — *Premium notes — Assets, when exhausted.*] 1. Action by plaintiffs, as receivers of Columbian Insurance Company, upon two promissory notes given by defendants to the company as "security notes." The charter provided, in respect to such notes, that, "as between the makers and the company, they shall be liable merely to the extent of the premiums written upon them, and for loans and liabilities of the company after the cash capital and other resources of the company shall have been first exhausted." *Held*, that the word *exhausted*, as used in the charter, does not mean actually applied toward the extinguishment of liabilities; that the cash capital and other resources may properly be said to be *exhausted*, when the losses, which they are held to meet, are concededly greater than their amount.

OSGOOD v. TOOLE 167

2. — *Assets — how proved.*] At the trial, the testimony of the book-keeper and secretary of the company, and also of the cashier, who was clerk of the receivers, as to the condition of the affairs of the company at the time of the appointment of the receivers, was admitted. *Held*, that this was proper; that the witnesses possessed the requisite knowledge, and that the adjustment of liabilities by the receivers, who are officers of the court, is *prima facie* evidence, in suits brought to recover upon premium or security notes. *Id.*

8. — *Renewal of void notes.*] Each of the notes was payable seven months after its date. *Held*, that the fact that one of them was given in renewal of a note which was, in violation of the charter, made payable twelve months after date, furnished no defense to it. *Id.*

4. — *Principal and surety.*] The makers of such a note and the company did not stand to each other in the relation of principal and sureties. *Id.*

5. — *Dividends.*] Plaintiff and defendants were joint owners of a steamer, plaintiff owning four-fifths, and defendants one-fifth. The steamer was managed by defendants, and, by them, insured for the benefit of all the owners in several mutual insurance companies, the plaintiff being charged with four-fifths of all the premiums; *held*, that the plaintiff was entitled to receive four-fifths of all scrip or dividends received by the defendants on account of such premiums. BOARDMAN v. GAILLARD. 217

6. — *Receipt — party not entopped by.*] The vessel was subsequently sold, and, after the defendants had received the proceeds of the scrip, the plaintiff received seventy-six dollars and thirty-five cents, as the balance then due him out of the earnings of the vessel, and gave a receipt therefor, which purported to be in full of all demands against the defendants. The plaintiff

INSURANCE — Continued.

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testified that he did not know, at this time, that anything had been realized from the scrip; *held*, that he was not estopped by the receipt from showing his mistake as to the facts, and that he only intended to give a receipt for the sum of money he actually received. *Id.*

7. — *Insurance Department — securities deposited with — power of Superintendent of — Section 6, chapter 463, 1853.* By section 6, of chapter 463, of Laws of 1853, all life insurance companies are required to deposit with the Comptroller of the State of New York, the sum of \$100,000, in certain stocks and securities in the said act specified, to be held as security for policy-holders in the company, the seventeenth section making special provision for the application of such securities, by proceedings to be instituted in the Supreme Court by the Comptroller, through the Attorney-General. By chapter 366, of the Laws of 1859, all the powers and duties created and given to the Comptroller by the act of 1853, were transferred from that officer to the Superintendent of the Insurance Department. *Held*, that the deposited securities are a special fund for the security of policy-holders, primarily, and that their rights may be protected by the Superintendent, in the mode pointed out by the act of 1853, and that that officer is at liberty to hold the securities and enforce or dispose of them under proceedings authorized by the court, and is not bound to hand them over to a receiver appointed by a local tribunal, under the Revised Statutes, for the benefit of general creditors. *RUGGLES v. CHAPMAN*..... 324

8. — *Policy of — false answers of assured, in application for — Answers of assured — how construed.* This action was brought upon a policy of insurance, issued by the defendant upon the life of plaintiff's testator. The policy was issued July 29th, 1867, and Althouse died June 14th, 1868, of paralysis. In the application for insurance, signed by Althouse, it was declared that his answers to the questions thereby propounded to him were fair and true; and that any untrue or fraudulent answers or suppressions of fact should render the policy null and void. Among the questions put to him was this: "Whether he ever had paralysis?" to which he answered, "No." *Held*, reversing a judgment in favor of plaintiff, entered upon the verdict of a jury, that, as the evidence in the case proved that, previous to the issuing of the policy, he had had two attacks of paralysis, both of which were, in point of fact, of a seriously alarming character, and were so considered by his physician, his neighbors and himself, this statement in the application was manifestly untrue; that the policy issued upon the application containing this false statement was void, and the plaintiff was not entitled to recover.

The statement in the application should be interpreted with fairness to the assured. If, in fact, he never had more than a temporary illness or ailment, merely indicating the disease in some of its symptoms, but of no pronounced type, his answer should be received and construed with reference to that state of facts. So it is a fair rule of interpretation, that the inquiries put to the applicant for life insurance, are deemed to relate "to matters which affect the general health and the continuance of life," and not to "temporary and occasional physical disturbances, the result of accidental causes, to which all men are more or less subject." These are not supposed to be in the minds of the parties.

On the other hand, when the party is interrogated in regard to a disease of well-marked symptoms, alarming in character, which all well-informed persons regard as affecting the general health, and as threatening the continuance of life from the danger of its recurrence, he is bound to speak and to state the exact truth. *BARTEAU v. INS. CO.*..... 430

9. — *Policy of life insurance — Notice and proof of death — when waived* A policy of insurance was issued by the defendant upon the lives of the plaintiff and her husband, payable to the survivor. The plaintiff's husband died, May 15th, 1872. On June 3d, 1872, a letter was written by the plaintiff to the defendant, informing it of the death of her husband, which letter the defendant retained and never demanded any further notice or proof of death. *Held*, that by so doing the defendant waived any insufficiency or informality in the notice.

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10. — *Preliminary proofs.*] The clause in policies, providing for preliminary proofs, is intended to furnish reasonable notice to the company, and is to be expounded liberally in favor of the assured. *Id.*

11. — *Premiums — where payable — Agent — authority of.*] A policy which was delivered in Rhode Island, by one Rockwell, an agent of the defendant, provided, that, in case the premiums should not be paid when due, it should be forfeited and cease and determine. No place for the payment of the premiums was prescribed in it, and the agent, at the time of delivering it, said that he would come around regularly and collect them. He did call and collect the first two half-yearly premiums, but failed to call for the one payable January 7th, 1872, which the plaintiff was ready to pay, but did not send to the company in New York, because she was waiting for the agent to call for it. Rockwell ceased to be the agent of the company in August, 1871, of which the plaintiff had no notice. The policy provides that "agents of the company are authorized to receive premiums when due * * * but not to make, alter or discharge contracts or waive forfeitures." *Held*, that the agent, acting as he was, for a foreign insurance company, had an implied authority to direct the assured, how, when and where the premiums were to be paid, and that the company, having received the benefit of the collections thus made by him, and having never required the plaintiff to pay the premium in New York, was bound by his acts. *Id.*

12. — *Policy of — delivery of by agent after loss — Premium — effect of non-payment of.*] Plaintiff applied to defendant's agents to change his insurance. The agents agreed to obtain what they could, on the return of plaintiff's policy of insurance in the Andes Insurance Company, and to give plaintiff credit for this amount on insurance in another company, the defendant not being distinctly named as such other company, and neither party having in view the continuance of both policies at the same time.

The Andes company refused to pay the return premium, and the plaintiff was informed of this. He said nothing more about a new insurance, and gave notice of loss to the Andes company. No rate of insurance was agreed upon between the plaintiff and defendant's agents, nor did plaintiff agree to accept the policy of insurance, which was forwarded to defendant's agents at their request. After the fire, the policy of insurance was received by the plaintiff, but no premium was paid defendant's agents. The policy contained the following condition: "If the premium of insurance shall not have been paid such insurance shall be void." *Held*, that the proposal to insure, came from the company, by their sending the insurance policy to their agents; that such proposal had never been accepted by plaintiff by a compliance with its terms or conditions, the policy not having been delivered and accepted, and no premium having been paid; that the delivery of the policy to the plaintiff, after the fire had taken place, was unauthorized, and did not create a contract of insurance. Even if it were otherwise, the premium of insurance not having been paid, the insurance was void, according to the terms of the policy. *TRAIN v. HOLLAND PURCHASE INS. CO.*..... 521

INTERLOCUTORY DECREE — *May be reviewed at General Term on a motion for a new trial.*

See REFERENCE, 4.

INTERLOCUTORY REPORT — *Practice as to.*

See REFERENCE, 3.

ISSUE — *Trial of, upon alternative writ of mandamus.*

See MANDAMUS, 2.

JOINT STOCK ASSOCIATION — *Usury — When cannot be set up as a defense by.*

See DE ROE v. SMITH..... 601

JUDGMENT — *On failure to appear — Service of summons without complaint.*

1. On the seventeenth of June, a summons, without a copy of the complaint, was served on the defendant, and on the nineteenth, a copy of the complaint was left at his office, the defendant having served no notice of appearance

JUDGMENT — *Continued.*

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- or put in an answer, the plaintiff, on the eighth of July, entered judgment.
Held, that the judgment was regular. **PAINE v. MCCARTHY**..... 78
- *Need not state that prisoner was asked, prior to sentence, if he had anything to say.*
See CRIMINAL LAW, 8.
- *Reversed when conviction is not.*
See CRIMINAL LAW, 5.
- *Motion to set aside after death of plaintiff.*
See PRACTICE, 3.
- *Restitution of money collected under.*
See PRINCIPAL AND AGENT, 4.
- *Of foreclosure — Entry of, within four days after filing of decision — provision of Code as to, directory.*
See FORECLOSURE, 2.
- *Cannot be attacked collaterally, when offered in evidence in another action — jurisdiction is presumed.*
See JURISDICTION, 1.
- *Against administrator is not evidence of a debt due by the intestate, as against his heirs or grantees.*
See EVIDENCE, 20.
- *Of absolute divorce — when court has no power to open.*
See DIVORCE, 1.
- *Set off of — The right of set-off does not attach, until the judgment, sought to be set off, has been actually recovered.*
See ATTORNEY, 2.
- *Discharge of — when will not be ordered upon conflicting affidavits.*
See WILLIAMS v. IRVING 720

JURISDICTION — *Of parties — presumed from the recovery of a judgment.]*

1. In an action to set aside a conveyance, as fraudulent as against defendants' creditors, the plaintiff offered in evidence, a judgment roll in an action in which he had recovered a money judgment against the defendant. This was objected to and excluded, on the ground that the papers did not show that the summons was served on the defendant in such action. *Held*, that this was error; that where a judgment is recovered in the Supreme Court, jurisdiction is presumed, and no proof of it is necessary. If irregular, the judgment cannot be attacked collaterally when offered in evidence in another suit. **RAY v. ROWLEY**..... 614
- *Of courts of this State over foreign corporations — Code, § 427.*
See FOREIGN CORPORATIONS.

JURY — *Finding of, conclusive — Promissory note — consideration of.]* 1. Where a contract for the sale and purchase of merchandise is entered into, and, thereafter, a bill of lading is delivered to the purchaser, differing in its provisions from the terms of sale agreed upon, and the purchaser, on receiving it, gives his note for the amount appearing due thereby, the question whether the note was given with knowledge of the alteration of the terms of the contract appearing in the bill of lading, is properly submitted to the jury, and their finding is conclusive. **HAMMETT v. BARNARD**..... 198

2. — *Competent jurors excluded from — when not ground for new trial.]* After a trial by an impartial jury, the fact that others, called as jurors, who were equally competent, but no more so, were excluded from the jury, is not ground for a new trial. **TWEED v. DAVIS** 252

— *Should not be influenced by degree of punishment to be inflicted on prisoner, if convicted.*
See CHAROE, 2.

- *Issues in action of partition — when must be tried by a jury.*
See PARTITION, 1.

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LACHES—*Motion to strike out supplemental answer denied on ground of—Statute of limitations.*] 1. Action commenced by plaintiff's testatrix, to have a conveyance of land made to defendant's testator, declared a mortgage. Pending a reference, all of the original plaintiffs and two of the defendants died. An amended supplemental complaint was served April 15, 1872, to which an answer was served May 7, 1872. This answer set up the statute of limitations. The original referee having died, the action was, by consent, again referred, and the trial commenced before the new referee. A motion was then made by plaintiffs, to have that portion of the amended answer, which set up the statute of limitations, stricken out. *Held*, that the motion was properly denied, on the ground of laches, a year and nine months having elapsed after service of the answer before making the motion. *SERVOS v. WOOD*..... 314

— *Motion to amend answer, when denied on account of.*

See PLEADINGS, 8.

LANDLORD AND TENANT—*Summary proceedings—Variance in proof—when fatal.*] 1. The respondent instituted proceedings, under the landlord and tenant act, to have the relator removed from a certain portion of a pier in New York, described in the complaint by metes and bounds. At the trial, there was no proof of any lease of the particular premises described. *Held*, that the variance was fatal. *PEOPLE v. CUSHMAN*..... 73

2. — *When relation of, exists.*] Where the relators, who were entitled to use a pier for loading and unloading canal boats, agreed to pay the respondent, the lessee of the pier, fifty dollars a month for the privilege of placing a derrick, scales and office upon a certain portion thereof, *held*, that this did not create the relation of landlord and tenant, and that, upon the termination of the agreement, they could not be dispossessed under the landlord and tenant act. *Id.*

See LEASE, 2.

3. — *Summary proceedings—Covenants in lease—Rent—when apportioned.*] Certain premises were leased by S. to B. & M., who subsequently executed to S., a mortgage on the leased and other property; the rent being unpaid, S. entered into possession of the premises under a warrant of dispossession; subsequently he foreclosed the mortgage, and at the sale, the premises were purchased by the relators; the deed conveying the premises, on which were the unexpired leases of B. & M., "to have and to hold the same for the unexpired term of the said leases;" *held*, that they thereby became, in effect, the assignees of the lease of B. & M., unaffected by the previous entry of S.; that the covenant to pay rent was not extinguished; and that the relation of landlord and tenant existed between S. and the relators. S., upon his death, devised certain of the premises, in which he had a fee subject to these leases, to his son; and the others, in which he had only a leasehold interest subject to the leases, passed to his executor; *held*, that the rent was not thereby apportioned, but remained an entirety so far as the tenants were concerned. *PEOPLE v. STUYVESANT*.... 103

4. — In summary proceedings, it is proper to demand interest upon the rent. *Id.*

— *Lease—covenant of quiet enjoyment—viability of landlord under.*

See LEASE, 5.

— *Summary proceedings—when injunction will not be granted, to prevent landlord from instituting.*

See INJUNCTION, 2

LARCENY—*What is.*

See CRIMINAL LAW, 1.

— *Stolen property, identity of.*

See CRIMINAL LAW, 12.

LEASE—*Of principal, when not bound by covenants of agents.*] 1. The plaintiffs demised certain premises in the city of New York, to one Smith, the general agent of the defendants; in the lease, which was under seal, Smith was described as the general agent of defendants; he executed the lease individually; the lessee took possession under the lease, and the premises were used to carry on the business of defendants; *held*, that the covenants

LEASE — *Continued.*

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in the lease were binding upon the lessee, and not upon the defendants as his principals. *KIERSTED v. O. & A. R. R. Co* 151

2. — *Tenancy under — Liability for rent.*] The defendants were permitted to occupy the premises, upon the undertaking of the agent that the lease should be ratified by the defendants, so as to be binding and obligatory upon them; it never was so ratified; *held*, that they did not thereby become tenants of the plaintiff, nor were they liable for the rent accruing under the lease. *Id.*

3. — *Use and occupation.*] The lessee occupied the premises for some months after the date of the lease; on or about the third of April, having ceased to be the agent of defendants, he left the premises, which were afterward used and occupied by the new agent, as a ticket-office for the defendants' route, until the twelfth of the ensuing February; *held*, that defendants were liable to the plaintiffs for use and occupation. *Id.*

4. — *Admissions — admissibility of.*] The statements by one member of a board of trustees in relation to certain leased premises, not constituting part of the *res gesta*, but made subsequent to, and in explanation of, what took place in the progress of the negotiation, are not competent evidence against the board or corporation of which he is a member.

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5. — *Covenant of quiet enjoyment — liability of landlord under.*] Under a covenant of quiet enjoyment contained in a lease, the landlord is not liable for the expenses incurred by the tenant in defending a suit brought by a third person claiming an interest in the leasehold premises, which claim, the court, in such suit, decides to be unfounded.

BUTTERWORTH v. VOLKENING 717

LEGATEES — *Residuary, have no interest in an estate, devised, until prior legatees have been paid.*

See WILL, 8.

LEVY — *When sufficient to sustain an action of replevin.*] A levy upon the right, title and interest of the judgment debtor in goods, is, in law, equivalent to a levy upon the things themselves. It amounts to a seizure of the goods for the purpose of selling the whole or a qualified interest therein, and is sufficient to sustain an action of replevin.

A judgment having been recovered against Thomas Waid, a son of the plaintiff, execution was issued thereon, and placed in the hands of defendant. M., one of his deputies, went to the house of the plaintiff, in his absence, and levied upon all the right, title and interest of the said Thomas, in certain property, and subsequently advertised the same for sale. Thomas had no right or interest, whatever, in the property. In an action of replevin, brought by the plaintiff, *held*, that he was entitled to recover. *WAID v. GAYLORD*... 607

LEX LOCI — *Draft — Unury.*

See BILLS OF EXCHANGE.

LICENSE — *By railroad company to cross its private lands, imposes no duty on it, except general duty to do no intentional wrong or injury.*

See RAILROAD Co., 1.

LIEN — *Surplus moneys — Recording act — Unrecorded mortgages — Bona fide purchaser.*] 1. On the 10th of April, 1871, W. Jeremiah, the owner of certain real estate, executed his bond, secured by a mortgage upon certain premises, for \$3,000, to J. Jeremiah, who, on the 25th of July, 1871, delivered the same to one Morgan. On September 13, 1871, W. Jeremiah conveyed the premises to Mary Ann, wife of John Jeremiah, without consideration, the grantee having actual knowledge of the mortgage then held by Morgan, and the consideration he had paid for it. The deed to Mary Ann Jeremiah was recorded October 5, 1871. On October 28, 1871, John Jeremiah executed a written assignment of the bond and mortgage to Morgan, and, on January 2, 1872, the mortgage and assignment were recorded. On the 16th of January, 1873, Mary Ann Jeremiah executed a mortgage upon the premises to one Andrews, for \$3,000, who assigned it to one Herman on the twenty-second of the same month, the mortgage having been recorded on the twenty-first. Herman had

LIEN — Continued.

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no notice of the first mortgage, except such constructive notice as was given by the record. *Held*, that when Morgan put his mortgage on record, January 2, 1872, it was a complete and perfect lien, and that the lien acquired by Herman, under the mortgage to Andrews, was subsequent thereto.

GORLET v. McMANUS..... 306

2. — *On vessels — Chap. 482, 1862 — materials furnished in this State — but vessel constructed in another.*] A lien does not arise under chapter 482 of the Laws of 1862 for materials furnished in this State and used in the construction of a vessel in another State. MOORES v. LUNT 650

3. — *On vessels — complaint.*] An allegation in a complaint that the articles mentioned as sold were purchased and furnished to vendee at the city of New York is sufficient to show that the contract was made and the indebtedness arose in this State. *Id.*

— *Must be discharged before tender under contract.*

See SPECIFIC PERFORMANCE, 1.

— *Of attorney on judgment, for costs, is subject to right of set-off.*

See ATTORNEY, 2.

— *Mechanics' lien — Items of work — lien filed within thirty days after performance of last item.*

See MECHANICS' LIEN.

LIS PENDENS — *Affidavit of filing — effect of defect in — Omission to file — persons not parties to action, only allowed to take advantage of.*] Where the affidavit of filing of notice of pendency of action is defective, but proper notice has, in fact, been duly filed, and no objection is made, by defendant's attorney, to the sufficiency of the proof, the judgment is not thereby rendered void; it is a mere irregularity, which may be disregarded or amended, under sections 173, 176 of the Code, in the absence of any injury to defendant.

The notice of *lis pendens* is made by statute, constructive notice to persons, claiming under the defendants in the action, but not parties to it; as their rights only are affected, it is reasonable that they only should be allowed to take advantage of the omission to file it. WHITE v. COULTER..... 357

— *In action for purchase-money paid.*

See SPECIFIC PERFORMANCE, 2.

— *Who bound by judgment recovered after filing of.*

See SPECIFIC PERFORMANCE, 2.

LONG ACCOUNT — *Sufficient evidence of.*

See REFERENCE, 6.

LOST PAPER — *Introduction of copy in evidence — proof of diligence.*

See EVIDENCE, 17.

MAINTENANCE — *Of wife, by husband — how secured — order for, under R. S., § 55 — when made — Court not authorized to take possession of husband's property through a receiver, in the first instance.*

See DIVORCE, 3.

MANDAMUS — *Against corporations.*] 1. Where the Special Term refuses to grant a peremptory mandamus, on the specific ground that the relators can maintain actions at law for the recovery of their demands, this court is not, by that determination, restricted to that reason, if any other is shown by the papers justifying the denial of this particular remedy.

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2. — *Remedy by, exceptional.*] The remedy by mandamus is one of an exceptional character, appropriate only to that class of cases where a clear legal right may be made to appear, without any other adequate legal means to redress and maintain it. *Id.*

3. — *Issue — trial of, on alternative writ.*] Where the fact upon which the right may depend is controverted, it must first be tried and determined, before a peremptory mandamus can be issued, and that determination is to be made, not upon conflicting affidavits, but upon an issue framed upon the

MANDAMUS— *Continued.*

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alternative writ, and must be tried by a jury, according to the course of the common law. *Id.*

4. — *Not allowed when action for money due lies.*] Although demands against corporate officers, or corporations themselves, may, under certain circumstances, be enforced by mandamus, where an action for damages may also be maintained in favor of the claimants, it cannot be done where an action can be maintained for the recovery of money claimed to be due and owing. *Id.*

5. — *Street openings—Remedy of employees of the commissioners.*] Persons employed by commissioners, appointed to lay out and open streets in the city of New York, to act as clerks, prepare maps, etc., have no right of action against the city; their only remedy is against the commissioners employing them. *THE PEOPLE ex rel. PURSER v. GREEN.*.....

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6. — *Necessity of seal to writ of—Contempt.*] A mandamus having been ordered, requiring the National Trust Company to pay to the relator a certain sum out of a fund in its hands, the same was attempted to be issued without the seal of the court, and, in this form, was delivered to the secretary of the company. Another claimant upon the same fund, having obtained and subsequently served, in due form, a like mandamus, the same being duly sealed, the Trust Company paid, under the advice of counsel, the sum required by the second mandamus, leaving insufficient moneys in its hands to meet the full amount of the relator's claim. *Held*, that the service of a writ of mandamus, without a seal, is a nullity. *Held*, further, that the officers of the company, not having intended any contempt, but acting under legal advice, in pursuing what they thought their duty, may avail themselves of the mere technical objection in proceedings against them for contempt.

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— *When allowed, to require justice to settle bill of exceptions.*
See BILL OF EXCEPTIONS, 3.

— *Denied when action can be brought.*
See STATUTES, 1.

MANUFACTURING CORPORATIONS— *Trustees of—failure to file a report—false report.*

See CORPORATION, 2.

MARITIME CLAIMS— *Power of State court to enforce.*

See SHIPS AND VESSELS, 1.

MARRIAGE— *Remarriage does not affect alimony.*

See ALIMONY.

MARRIED WOMAN— *Separate estate—when bound.*] 1. Where the consideration of a debt, contracted by a married woman, is one going to the direct benefit of her estate, or for the benefit of herself on the credit of her estate, the intention to charge the separate estate need not be stated in the contract or instrument evidencing the indebtedness.

QUASSATC BANK v. WAUDELL...... 125

2. — *Note of—When liable on.*] Defendant, a married woman, having a separate estate, opened a bank account with plaintiff in 1860, receiving a pass-book, and depositing money to her credit either by separate deposits made by her or the proceeds of her own notes discounted for her by the bank, which money she drew out from time to time by check. The account was continued until 1863, when the note in suit was given for the balance due to the plaintiff upon the account. The referee found that the notes, for which the note in suit was given, were discounted on the credit of her separate estate and for her benefit. *Held*, that she was liable upon the note. *Id.*

3. — *Benefit of separate estate of—what debt created for.*] A part of the money borrowed by defendant, was so borrowed to pay interest on mortgages on real estate belonging to her. *Held*, that this was a debt created for the benefit of her separate estate. *Id.*

MARRIED WOMAN — *Continued.*

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4. — *Carrying on business.*] Defendant owned, as her separate property, a place near Newburgh, of twenty acres, which she managed herself, buying what was necessary for it, paying for such purchases sometimes in money, sometimes by check and sometimes by note, and hiring persons to work on the place.

Whether or not this was a *business* within the act of 1862, *quere?* *Id.*

5. — *Owner of separate estate — Unauthorized acts of agent in contracting for — ratification of — Liability for goods purchased — Chattel mortgage — neglect to read before signing — effect of, not avoided thereby, in absence of fraud.*] The husband of defendant, who was the owner of a separate estate, purchased certain merchandise and took a bill of sale of the same in her name, without her knowledge and without authority. At the time of the sale, the defendant gave her own note, secured by mortgages assigned by her, for a portion of the purchase-money, and a chattel mortgage upon the property purchased, to secure the remainder thereof, and subsequently executed a second chattel mortgage upon the same property to a third person. *Held*, that by these acts, she ratified the unauthorized acts of her husband, and that she was liable for the price of the goods so purchased by him.

The defendant testified that she did not know what she was signing, when she signed the chattel mortgages; *held*, that as it appeared from the evidence that she signed them voluntarily, without misrepresentation or fraud, that their effect could not be avoided by her negligence or omission to read them.

FOWLER v. TRULL..... 409

6. — *Separate estate — articles supplied for benefit of — liability for.*] This action was brought to recover the price of certain manufactured articles, for the repair of a house belonging to the defendant. The articles were ordered by the husband of the defendant; and the jury having found that he was the general agent in reference to the repairs, and the defendant having accepted the fruits of his acts by the increased value of her estate, *held*, that the defendant was liable. *MILLER v. HUNT*..... 491

7. — *Separate estate — when debt is contracted for benefit of.*] The defendant purchased of the plaintiffs certain articles which were used in furnishing a house in the city of New York, of which she was the owner. She claimed that she acted as agent of her husband in making the purchase, but the referee found that the sale was made to her upon the faith of her representations that she owned the house, and was herself buying the furniture to furnish it. *Held*, that the debt was contracted for the benefit of her separate estate, and that she was liable therefor. *KELTY v. LONG*..... 714

8. — *Complaint, in action against — what need not be alleged in.*] Under the statute of this State, a complaint against a married woman need only contain those averments which are requisite in an action at law, and if the defense of coverture be interposed by answer, it may be controverted, or avoided by evidence, under § 168 of the Code, without alleging the facts proposed to be proven for that purpose in the pleading. *Id.*

— *Husband must be joined with, in action concerning lands owned by them jointly.*

See HUSBAND AND WIFE, 1.

— *Failure to serve summons on wife of purchase-money mortgagor — effect of.*
See FORECLOSURE, 3.

MEASURE OF DAMAGES — *Breach of contract to purchase goods.*

See DAMAGES, 4.

MECHANICS' LIEN — *Chapter 558, 1869 — Items of work — Lien filed within thirty days after performances of last item.*] The plaintiff performed certain services, under a written contract to plaster a house for a fixed sum. Work was commenced in April, 1872. The plaintiff did other work by order of the defendant, from time to time during the summer, the last item of work being performed 14th August, 1872. The lien was filed 7th September, 1872. The defendant asked the court to charge that, as matter of law, all work done previous to thirty days before the filing of the lien, must be excluded. The court refused so to charge. *Held*, that such refusal was proper. The lien act gives liens for labor done, provided the notice is filed within thirty

MECHANICS' LIEN — *Continued.*

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days after the performance and completion of such labor. The plaintiff's evidence tended to show that it was all really one piece of work, although the items were directed to be done, and were done, at different times between April and the fourteenth of August, and he was entitled, under the lien act, to recover for all his labor. *COSTELLO v. DALE*. 489

MEMORANDA — *As evidence.*] 1. Plaintiff testified from an account-book, as to money advanced to, and paid for the use of defendant. The defendant offered in evidence the remaining portion of the book, from which plaintiff had testified. On objection by plaintiff, the referee ruled to allow the book in evidence, so far as related to any transactions between plaintiff and defendant. The defendant excepted and moved to strike out the testimony of the items, mentioned in the book referred to, unless the book should be put in evidence by the plaintiff. The motion was denied, on the ground that the book was in evidence as to the entries of transactions between plaintiff and defendant. The defendant again excepted. *Held*, that when defendant offered one portion in evidence, it was error to admit another portion, which he did not offer. *READ v. SMITH*. 263

2. — *One portion of, admissible to test accuracy of another portion already in evidence.*] Where plaintiff testified from an account-book as to moneys advanced to defendant, and such portions of the account-book as contained entries showing such advances, were in evidence, *held*, that the referee erred in refusing to allow defendant to test the accuracy of the entries proved, by showing, by other entries in the book, that they were not made at the dates claimed, and for this purpose, showing that they were not chronological in order with other entries, or had been interpolated amongst other entries. *Id.*

— *When admissible — as sufficient under statute of frauds.*

See EVIDENCE, 7; STATUTE OF FRAUDS, 1.

— *Admissibility in evidence, of deposition taken before trial, as.*

See EVIDENCE, 13.

— *Parol evidence of contents of, inadmissible.*

See EVIDENCE, 25.

MERGER — *See TENANTS IN COMMON, 1.*

MISJOINDER — *Of causes of action — what causes of may be joined.*

See CORPORATION, 2.

MISTAKE — *Contract made under.*] 1. An act done or contract made under a mistake or in ignorance of a material fact, is avoidable and relievable in equity. *BOYD v. DE LA MONTAGNE*. 696

— *Mutual mistake must be shown, to authorize reformation of solemnly executed contract.* *PHILLIP v. GALLANT*. 528

MORTGAGE — *Sale on foreclosure — when not set aside — order denying motion to set aside, not appealable.*

See FORECLOSURE, 1.

— *Recording of — Surplus money — party, whose mortgage is first recorded, entitled to.*

See FORECLOSURE, 1.

— *Time of payment of, may be extended by parol.*

See CONTRACT, 9.

— *See FORECLOSURE.*

MORTGAGOR AND MORTGAGEE — *Where fraud of mortgagor will not affect rights of mortgagee.*

See CHATTEL MORTGAGE, 3, 4.

MOTION — *Made upon service of papers on administrator of plaintiff, to set aside judgment for divorce, denied.*

See PRACTICE, 3.

MOTION — *Continued.*

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— *For new trial cannot be heard at Special Term while an order, directing exceptions to be first heard at General Term, continues in force.*

See EXCEPTIONS, 2.

— *To strike out supplemental answer denied on account of laches.*

See LACHES.

— *Ex parte* — *Referee will not be appointed to take affidavit for.*

See REFERENCE, 7.

— *To revise action.*

See ACTION, 1.

MOTION PAPERS — *Defects in copies disregarded, when they do not exist in originals.*

See REMOVAL OF CAUSE.

MUNICIPAL OFFICER — *Effect of his neglect to make return of assessment.*

See ASSESSMENT, 2; STATUTES.

NATIONAL BANK — *Residence of, within U. S. statute relative to removal of causes to U. S. courts.*

See REMOVAL OF CAUSES.

NEGLIGENCE — *Damages — Horse railroad.*] 1. A person approaching a horse-car (which has stopped for him), and, in so doing, crossing another track and attempting to enter on that side, is not necessarily guilty of negligence contributing to injuries sustained by him by reason of the starting of the car after he has got hold of the handle and has one foot on the step, in which position he is dragged along till struck by a car passing on the adjoining track. It is a question for the jury on the evidence.

Where the evidence shows that injuries continued to exist up to the time of the trial, the testimony of a physician as to plaintiff's condition four months after the injury, is admissible. *DALE v. BROOKLYN CITY, ETC., R. R. Co.*.... 146

2. — *Receipt given for goods.*] A person who received goods and signed a receipt for them, testified that he did not notice that it stated that the goods were received from the plaintiff. *Held*, that it was negligence, on his part, not to have discovered that fact, and that the consequences of his negligence must be borne by the defendant. *BASSETT v. LEDERER*..... 274

3. — *Chap. 763, 1872 — commissioners of water-works appointed under — Streets — duties of village as to repairs of — Knowledge of agent is knowledge of principal.*] The plaintiff was injured by driving into a ditch in one of defendant's streets, made by the commissioners of water-works for the purpose of making repairs to pipes, etc., and which had been left unguarded. *Held*, that the defendant was liable; that the commissioners were subordinate to the defendant, to which the water-works belong, and that the commissioners are merely the agents of the defendant, in their construction and maintenance. *Semble*, that even if this were not so, the defendant would be liable, on the ground that it was its express and exclusive duty to keep in repair the streets of the village, and that as the superintendent of the water-commissioners, under whose direction the work was done, was also the superintendent of streets, his knowledge was the knowledge of defendant.

DEYOE v. VILLAGE OF SARATOGA SPRINGS..... 341

4. — *Fences and cattle-guards — duty of railroad company to maintain.*] A cow, owned by the plaintiff, was left in charge of a boy, who drove her from plaintiff's stable to an open lot, adjoining defendant's track, near a crossing, in the vicinity of which, some of the fences were temporarily and necessarily down, for the purpose of repairing the roadway of defendant; the boy having left the cow for a short time, she strayed upon the track and was killed by a passing train; *held*, that the defendant was liable.

The defendant was bound to erect and maintain fences and construct and maintain cattle-guards at the crossing near which the cow was run over, and having failed to do so, was liable to the plaintiff for the damages sustained by him. The exceptions to this rule are, where it appears that the plaintiff

NEGLIGENCE — *Continued.*

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drove his cattle on the road and left them there, or voluntarily permitted them to stray upon the track, or did some positive act increasing the danger.

BRADY v. RENSSELAER & SARATOGA R. R. Co. 878

— *When express company liable for, only — Not presumed.*
See COMMON CARRIER.

— *Omission to read paper before signing it — Effect of paper not avoided by.*
See MARRIED WOMAN, 5.

— *Contributory, in crossing track of railroad company at place, where company had not notice that public were accustomed to cross.*

See RAILROAD COMPANY, 1.

— *Contributory.*
See COMMISSIONERS OF HIGHWAYS, 3.

— *Of contractor — when principal liable for.*
See PRINCIPAL AND AGENT, 10.

— *When execution of contract without understanding its terms, &c.*
See CONTRACT, 6.

— *Of commissioners of highways, in repairing bridge — when not liable for.*
See COMMISSIONERS OF HIGHWAYS, 3.

NEW MATTER — *Constituting defense must be set up in answer.*

See DEFENSE, 1.

NEW TRIAL — *When granted on grounds of surprise and newly-discovered evidence.*] 1. This action was brought to recover for debts contracted and payable in England. The defense was, that a composition deed had been executed by the debtors, and assented to and approved by the requisite number and amount of their creditors, which, by the terms of the English bankrupt laws, discharged them from their debts, upon compliance with the terms and provisions of the law, under which it was entered into; one of which was that the deed should be left to be registered, within twenty-eight days from the date of its execution. The deed was executed by the defendant, Chittick, personally, and by Lindsey, by Kerr, his attorney. It was dated December 3, and registered December 30. The defendant, Chittick, was examined before trial and testified that he left England November 27, thus showing that he could not have executed the deed on December 3. At the trial, the plaintiff claimed the deed to be invalid, as it appeared that it was not registered within twenty-eight days of its execution. *Held*, that upon these facts, *alone*, a new trial should not be granted on the ground of surprise, as defendants' attorney might, by a reasonable degree of diligence, have discovered the discrepancy between the date of the deed and the time of the defendant Chittick's departure from England, and have introduced evidence to explain it.

Before the trial, to a question put by one of the defendants' counsel, as to what they relied on in opposition to the deed, or what their point in the case was, one of the plaintiff's counsel replied by asking, "What effect do you suppose the English bankruptcy law has on American debtors?" And, again, when an application was made by defendants, to dismiss the case from the short-cause calendar, one of the plaintiff's counsel stated, "that he believed the case would turn only on questions of law, and that the facts were not in dispute." *Held*, that the effect of this conduct was to mislead the defendants' counsel and induce him to believe that the legal effect, alone, of the proceedings was to be the subject of contest, and that no formal omissions existed in the documents relied upon, and that a new trial was properly granted upon the ground of surprise. CHAMBERLAIN v. LINDSAY. 281

2. — *Case on appeal from order granting — what should contain.*] When a new trial is granted upon the judge's minutes, it must be considered as granted upon all the proceedings of the trial, including all the testimony and the charge of the judge; and when the case on appeal does not profess to contain the whole evidence, and gives only a portion of the judge's charge, the appellate court cannot say that the granting of a new trial was error.

BOYER v. BROWN. 615

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— *Motion for, cannot be made at Special Term, when the exceptions are ordered to be first heard at General Term.*

See EXCEPTIONS, 2.

— *Exclusion of competent juror not ground for.*

See JURY, 2.

— *When not granted for error in charge.*

See PROMISSORY NOTE, 2.

— *Amendments of pleadings after new trial ordered.*

See PLEADINGS, 1.

NEW YORK CITY — *Salaries of police justices of.*

See STATUTES, 11.

— *Board of estimate and apportionment of.*

See STATUTES, 13.

— *Commissioner of public works of.*

See STATUTES, 6, 7, 8.

— *Employees of commissioners.*

See STATUTES, 2, 8.

— *Contract for public work — when municipal officers have no authority to make.*

See McDONALD v. THE MAYOR, ETC. 719

NON-RESIDENT — *Attachment against — effect of omission to procure order of publication or make personal service within thirty days.*

See ATTACHMENT.

NOTE:

See PROMISSORY NOTE.

NOTICE — *To produce papers — Effect of refusal.*

See EVIDENCE, 5, 6.

NOTICE OF APPEAL — *Service of, on one partner sufficient.*

See MILLER v. FERRINE. 690

NOTICE OF APPEARANCE — *Withdrawal of — when allowed.*

See APPEARANCE, 1.

NOTICE OF SALE — *In foreclosure by advertisement — Requirements of.*

See FORECLOSURE, 5.

OFFICE — *Title to, cannot be inquired into on certiorari.*

See CERTIORARI, 1.

— *Payment of salary to person in possession of.*

See SALARY.

— *Term of.*

See STATUTES, 14.

OFFICERS — *Of corporation — when not personally liable on contract signed by them individually, but made in its behalf.*

See CONTRACT, 10.

OPINION — *Of expert, when admissible.*

See EXPERT.

ORDER — *Power of justice, at Special Term, to vacate.] This action was tried before a jury, and a verdict rendered for plaintiffs. Defendants appealed to the General Term, and a case was settled and served. The General Term reversed the judgment and ordered a new trial upon a specific objection. After the entry and service of the order of reversal, plaintiffs obtained an order from Mr. Justice DANIELS, allowing them to apply for a resettlement of the case, by striking out this exception, and an order striking it out was subsequently made by Mr. Justice VAN BRUNT, from which order*

ORDER — *Continued.*

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an appeal was taken to the General Term, where it was affirmed by default. Subsequently, a motion was made to have the orders of Justices DANIELS and VAN BRUNT vacated, which was denied. *Held*, that this was proper; that, to grant the motion, would be to allow one justice at Special Term to reverse and vacate the order of another justice at Special Term; that no such practice exists, nor is there any provision of the Code which permits it.

HALLGARTEN v. ECKERT..... 117

ORDER OF ARREST — *Power of county judge to grant.*] An order of arrest may be granted by a county judge, though the action in which it is granted is not triable in his county, and though the attorney for the moving party does not reside therein. KENNEDY v. SIMMONS..... 680

— See ARREST.

PAPERS — *Notice to produce — When party may not introduce them in evidence.*

See EVIDENCE, 6.

PARTIES — *Husband and wife must join in action for occupation of, and damages to, lands owned by them, jointly.*

See HUSBAND AND WIFE, 1.

— *In action to have foreclosure sale declared void, the purchaser is a necessary party.*

See FORECLOSURE, 7.

— *In action against corporation — when stockholders not necessary parties.*

See ACTION, 3.

— *Proper party defendant, in action brought on obligation of one of several consolidated corporations, after their consolidation.*

See PROUTY v. MICH. SO. & N. IND. R. R. CO..... 655

PARTITION — *Action for, under chapter 238, 1853 — issues in — when must be tried by a jury.*] 1. The plaintiff brought this action, as heir-at-law of Abraham Wood, deceased, to obtain the partition of certain lands in the possession of the defendants, who claimed them as devisees of said Wood. The plaintiff alleged that the devise was void, and brought this action in pursuance of chapter 238, Laws 1853. A motion was made by the plaintiff, for an order directing the settlement of the issues in the action and that the same be tried by a jury. *Held*, that it was error for the Special Term to deny the motion. HEWLETT v. WOOD..... 478

2. — *Action for, may be maintained by vested remainderman — Vested remainder — what creates.*] The provisions of a will, by which real property is given to "the heirs of the body of A., whom she shall leave her surviving," give to the devisees, during the lifetime of A., a vested remainder in fee, liable to open and let in after-born children, and liable, also, to be defeated by the death of any devisee before the decease of A.

One who is entitled to such a vested remainder in lands is in possession of his undivided share, within such meaning of the statute relating to actions for partition of lands, although there is a life estate covering the whole lands, and the life tenant is in possession. CHISM v. KEITH 589

3. — *Sale — effect of on contingent interests of persons not in esse.*] Future contingent interests of persons, not in esse, may be barred by a sale under a judgment in partition. *Id.*

— *When proceeds of sale in, will be considered as realty — Distinction between the effect of sale in, and one had under will.*

See WILL, 7.

PARTNERSHIP — *Note made in firm name after dissolution of.*] 1. After the dissolution of a partnership, a note made in the firm name, with the assent of the partners, for a debt due by the firm, is a valid obligation.

RANDOLPH v. PECK..... 139

2. — *Note made after dissolution of — debt due by firm sufficient consideration for.*] The debt due by the firm, particularly when an extension of the

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time of its payment is secured by giving the note, is a sufficient consideration therefor. *Id.*

3. — *Participation in profits of — when it makes a man a partner.*] Participation in the profits of a firm, unless enjoyed under an express agreement that it is given in lieu of compensation for services, and that it gives no interest in the business, makes a man a partner. *GREENWOOD v. BRINK*. . . 237

4. — *"& Co."* — Chapter 281, 1833.] Under chapter 281, of Laws of 1833, which makes it a penal offense to assume a copartnership name where no partnership exists, it is a sufficient answer to show that the firm name actually represents persons, who are liable as partners to third persons and creditors. *Id.*

5. — *Farm — When agreement to work farm on shares, does not create — Evidence.*] An agreement was entered into, by which defendant was to work a farm of the plaintiffs on shares, which, after providing for the division of the crops, contained the following clause: "All the profits arising from the working and farming of said farm, to be divided equally between the parties to this agreement. All losses and gains upon said farm for one year from the 1st of March, 1870, is to be divided equally between the said parties." *Held*, that a partnership was not thereby created between the parties.

At the trial, the following question was put to defendant: "During the whole term was there a profit made or loss sustained in the general result? state all the facts." The referee refused to allow him to answer it. *Held*, that this was proper, as the question was too general; and that as the first part of it was clearly objectionable, that was sufficient to authorize its rejection as an entire question.

Defendant offered to prove the cost of picking, curing and baling the hops. *Held*, that the evidence was properly rejected, for the reason that by the terms of the contract, defendant was bound to perform this work, and because no such claim was set up in the answer.

There were two dwelling-houses upon the farm, one of which, before the making of the agreement, and during the continuance thereof, was occupied by the plaintiffs and the other by the defendant. The defendant offered to prove the value of the use of the dwelling occupied by the plaintiffs. *Held*, that as the agreement contained nothing in regard thereto, and as both parties had acted on the assumption that each was entitled to the possession of the house occupied by himself, that the evidence was properly rejected.

GREGORY v. BROOKS. 404

6. — *Dissolution of — Acceptance of note of one member of, in payment of partnership debt — effect of.*] The defendants, while engaged, as co-partners, in the business of saloon-keeping, became indebted to the plaintiff for beer purchased from him. Subsequently, the partnership was dissolved, Harris selling out his interest to Crocker, who agreed to pay the firm debts. The plaintiff, with knowledge of the dissolution, accepted Crocker's note for the debt, upon the agreement that, if paid, it would cancel the debt, but, if not, that he should hold the firm for it. Crocker having failed to pay the debt, this suit was brought. *Held*, that the plaintiff, by accepting Crocker's note, did not discharge Harris from his liability for the firm debts; that Harris was liable to the plaintiff, as principal debtor, and not merely as surety of Crocker. *VERNAM v. HARRIS* 451

7. — *Title to lands of, taken in name of one partner — Equitable defense — when it may be set up to legal action.*] This action was brought by the plaintiff as sole devisee of John C. Thompson, deceased, to recover certain lands in the possession of the defendant. The defendant alleged in his answer that the land was bought as partnership property by J. C. Thompson and defendant, and that the deed was taken in the name of J. C. Thompson which was the firm name; that he had paid his share toward the purchase; that he was in possession as partner and had expended a large amount in improving the land. At the trial, the justice excluded proof of these allegations; *held*, that this was error. *THOMPSON v. EGBERT*. 484

— *Service of a notice of appeal on one partner is sufficient.*

See MILLER v. FERRINE. 630

PAYMENT — *In Confederate money.*

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See CONTRACT, 8, 4.

— *Of money, though voluntarily made, may be recovered back, if fraudulently obtained.*

See SUPERVISORS.

— *Of mortgage — time of, may be extended by parol.*

See CONTRACT, 9.

— *A party is entitled to recover money, paid upon a fraudulent contract.*

See CONTRACT, 8.

— *Time of — when not extended by taking collateral security.*

See PROMISSORY NOTE, 2.

PERFORMANCE — *Defective — defense of — remedy.*] 1. A party may retain, without compensation, the benefits of a partial performance only when, from the nature of the contract, he must receive such benefits in advance of a full performance, and when, by its terms or just construction, he is under no legal obligation to pay until the performance is complete; otherwise, the party receiving the benefit of insufficient performance, must find his relief in damages. *KROM v. LEVY* 171

Of sealed instrument, may be postponed by parol.

See CONTRACT, 9.

PERJURY — *Precise locality of commission of offense not matter of description and need not be proved.*

See INDICTMENT, 5.

PLACE OF TRIAL — *Of indictment for bigamy.*

See CRIMINAL LAW, 11.

PLEADINGS — *Amendment of — after new trial ordered — power to allow.*]

1. The court has power, on special motion made on notice, to allow a supplemental and amended complaint to be served after a new trial ordered by the Court of Appeals; the facts still remaining essentially the same as alleged in the original complaint, though more minutely and particularly stated and the parties plaintiff being changed in conformity with a transfer of the interests of the original parties. That the demand for judgment differs very materially, in the amended complaint, from that in the original, is not important, as any relief consistent with the facts may be given under section 275 of the Code. *GETTY v. SPAULDING* 115

2. — *General denial — what evidence admitted under.*] The action was brought to recover the price of the goods sold. The answer consisted of a general denial. *Held*, that the defendant could not introduce evidence to prove that he had paid the broker for the goods. *BASSETT v. LEDERER* 274

3. — *Motion to amend answer — when denied — Laches — Discretion.*] When a case has been long pending, and is on the second trial before a referee, and when the evidence given on the preceding trial subjects the affidavit, made in support of the application for leave to amend the answer, to grave suspicions as to the correctness of its statements, the court will consider such circumstances on such an application.

Whether an amendment to a pleading should be allowed or not, has been confided, by the provisions of the Code, very much to the discretion of the court hearing the motion. And, ordinarily, the exercise of that discretion is not afterward the subject of review by the General Term, upon appeal.

SMITH v. BODINE 309

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— <i>Of court to open decree for absolute divorce.</i>	
<i>See</i> DIVORCE, 1.	
PRACTICE — <i>Action on individual claim where plaintiffs are described as executors in title.] 1. Where the plaintiffs were described in the title of the cause as executrix and executor, and, in the body of the complaint, a good cause of action is completely alleged and set forth, but it appears to be in the plaintiffs' own right, and not in their representative capacity, held, that a demurrer on the grounds that the plaintiffs had no capacity to sue, it not appearing from the complaint that they were executrix and executor, and that the complaint did not state facts sufficient to constitute a cause of action, was frivolous.</i>	
MURRAY v. CHURCH	49
2. — <i>Death of party, pending appeal—Substitution.] An order of the General Term, determining an appeal from an order, made when the representatives of a party, dying pending the appeal, were not properly before the court, is irregular, and may be set aside on motion at Special Term.</i>	
JAY v. DE GROOT.....	118
3. — <i>Divorce—Judgment—motion to set aside after death of plaintiff.] Where a judgment for divorce has been obtained by the plaintiff against the defendant, and the plaintiff has subsequently died; held, that a motion, made upon papers served upon his administrator, to set aside the judgment for fraud and irregularity, was properly denied. WATSON v. WATSON.....</i>	267
PREMIUM NOTES — <i>Liability on.</i>	
<i>See</i> INSURANCE, 1.	
PRESUMPTION — <i>From other transactions.</i>	
<i>See</i> EVIDENCE, 9.	
— <i>From appearance of prisoner during trial.</i>	
<i>See</i> CRIMINAL LAW, 2.	
PRINCIPAL AND AGENT — <i>Agent—purchase of principal's property by.] 1. Plaintiff was the owner of certain mining property, of which the defendant, as his agent, had the care and management. Being desirous of disposing of the same, he entered into an agreement with defendant, whereby he was to convey the Irondale and Denmark mines, and a note made by one Condit, to defendant for \$201,000. Plaintiff was induced to enter into this agreement by the representations of defendant, that the Irondale mine could be sold to one Popenhausen, for \$100,000; it being distinctly understood between the parties that the defendant would realize the sum of \$25,000 for his services in making the sale, and no greater sum. At the time this agreement was entered into, defendant had already contracted to sell the Irondale mine to Popenhausen, for nearly \$200,000. Plaintiff, in ignorance of this fact, conveyed the Irondale mine to defendant in pursuance of the agreement, and he conveyed it to Popenhausen, receiving nearly \$200,000 for it. Subsequently, plaintiff discovered the fraud and brought this action to have the sale of the Denmark mine canceled, and to recover the difference between the price for which the defendant sold the Irondale mine and the amount paid by him as the purchase-price of it, including the expenses attending the sale and</i>	

PRINCIPAL AND AGENT — Continued.

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completion of the title and a compensation to him of \$25,000. *Held*, that he was entitled to recover; that before the defendant could lawfully become the purchaser of the property which constituted the subject of his agency, his relations to it required that he should fully and fairly disclose to his principal, all the facts which were known to him that could be supposed to affect the terms on which it might be proper to dispose of it. *BROWN v. POST* ... 803

2. — *Sale between — when sustained.*] In order to sustain such a transaction and secure the sanction of a court of equity for it, the agent must be able to show it to be fair and honest, and to have been preceded by the disclosure of what he had ascertained or discovered concerning its value and propriety, where the principal has not dispensed with the performance of that duty. *Id.*

3. — *Fraudulent representations — discovery of — active vigilance — not required.*] Before the deed for the Irondale mine was received by the purchaser, intimations were given to the plaintiff's counsel that the defendant had sold the property for more than the plaintiff supposed he was receiving, but, upon a partial investigation being made, the suspicion created by such intimations, was removed. A more decided investigation might have led to a discovery of the truth before the deed was delivered. *Held*, that the plaintiff was under no obligation to the person deceiving him to make such investigation. A person deceived by the fraudulent misstatements of another, owes him no duty of active vigilance in the discovery of the fact that they are false; where, by means of that character, he deceives another to his prejudice, there is nothing in the law requiring him to be protected against the consequence of his wrong, because the person imposed upon, did not suspect him and adopt some means to discover the imposition. *Id.*

4. — *Agreement — void as against public policy — Judgment — reversal of — restitution of money collected under.*] A judgment was entered in this action in favor of the defendant, from which the plaintiff appealed to the General Term, where it was reversed, and a new trial ordered. Pending the appeal, the defendant proceeded to collect the judgment by execution and levy, and the appointment of a receiver of the plaintiff's property. Certain property of the plaintiff was sold on execution under an agreement made between the defendant and plaintiff's agent, who was the defendant's receiver, that the money should not be restored in case the judgment was reversed, and that plaintiff's agent should be permitted to purchase and become the owner of the property thus sold. After the reversal of the judgment at General Term, an order was made directing the restitution to the plaintiff, of the amount collected under the judgment. *Held*, that the order was correct; that the agreement between plaintiff's agent and defendant was void, as against public policy, as it in effect provided for transferring the property of the principal to the agent, and that it was not binding upon the plaintiff.

HOLLOWAY v. STEPHENS 808

5. — *Promissory note — mere possession of, by agent, unindorsed — authority conferred by such possession to receive payments thereon.*] The mere fact that a person claiming to be the agent of the payee of a promissory note has the same in his possession, unindorsed, does not confer upon him an apparent authority to receive payments thereon.

WARDROP v. DUNLOP 825

6. — *Payments on note to agent — when binding on principal — Ratification.*] An agent who had in his possession a promissory note, received a payment thereon without authority from his principal, who, when informed of the payment by the agent, remained silent for nearly three years, allowing the money to remain in the agent's hands. At the end of this time, he wrote to him about the note, and, in computing the amount due thereon, allowed the payment so made. During this time other payments had, unknown to the principal, been received by the agent. *Held*, that, by his letter to the agent, he was precluded from denying his authority to receive the first payment, and that by ratifying this act of the agent, and by failing, after knowledge of the first payment, to notify the maker of the note that the agent had no authority to receive payments, he conferred upon him an apparent authority to receive the subsequent payments. *Id.*

PRINCIPAL AND AGENT—Continued.

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7. — *Sale—whether made by vendee as principal or as agent—Power of vendee to create relation of, by statements made to vendor after sale—Silence of vendor after such statements made, not ratification of, or acquiescence in claim.* Plaintiff sued defendant, claiming to have sold him a quantity of hops. The defendant alleged that he bought the hops as agent of H. & C., of N. Y.; that plaintiff knew he was such agent; that the hops were shipped to H. & C. with plaintiff's knowledge and assent, and were sold by them, and that, subsequently, they failed without having paid for them. The referee found that the sale was made to the defendant as principal and not as agent of H. & C. *Held*, that the evidence in the case was sufficient to authorize the referee so to find.

After the sale of the hops by H. & C., the defendant inclosed an account of the sale to plaintiff, and disclaimed any personal responsibilities for the proceeds, telling plaintiff he must look to H. & C. for his pay, as he, defendant, acted only as their agent; to this letter plaintiff paid no attention. On the trial, it was claimed that the plaintiff thereby ratified and acquiesced in the claim of the defendant, who was thereby released from any liability to plaintiff. *Held*, that the mere statement of the proposition would seem to be its sufficient refutation. It is not possible that one can release himself from the obligation of a valid contract, by telling the other party that he must look to some third person for its fulfillment, or that the contract was one of agency and not made by him as principal. The silence of plaintiff might be construed as some evidence of the truth of the statements made, but by no possibility could it convert a principal into an agent, upon the theory of ratification, acquiescence or estoppel. *DARROW v. NORTHROP*. 431

8. — *Liability of principal for acts of agent, after termination of agency, notice of such termination not having been given.* In this action, brought for goods sold and delivered, it appeared that one Boyce had, for a long time, acted as the agent of defendant in carrying on the lumber business, and that, after the termination of his agency, the plaintiff, who had received no notice that he had ceased to be defendant's agent, sold the lumber to him, for the purchase-price of which this suit was brought. *Held*, that defendant was liable. *KERSLAKE v. SCHOONMAKER*. 436

9. — *Agent—acts of, in excess of authority—principal not bound by, to party who has not suffered loss or injury thereby.* By the act of an agent within the general scope of his employment, but in excess thereof, the principal is not bound to a third person who has rightfully believed the agent was acting within his authority, unless such third person has sustained some loss by reason of such act of the agent. *DOWNER v. CARPENTER*. 591

10. — *Contractor—when principal liable for acts of.* A party who directs an obstruction to be put in a highway, cannot shield himself from liability, by showing that it was put there by a contractor. *JONES v. CHANTRY*. 613

11. — 3 *R. S.*, 5th ed., p. 168—*Agent—ratification of acts of.* William Ingram died, intestate, July 16th, 1864, leaving a widow, the plaintiff, and two minor children. The deceased had, at the time of his death, in his residence, \$925 in money, and \$300 in certificates of deposit, in the Port Jervis Bank. Immediately after his death, Oliver Young, the defendant's intestate, and the uncle of the plaintiff, told her that it was not safe to keep the money and securities in the house, and he afterward, apparently with her consent, deposited the same in the Port Jervis Bank. The plaintiff drew from the bank \$225, and the remaining \$700 was invested by Young in government bonds, which were deposited in the bank, the plaintiff going to the bank and drawing the interest upon them regularly, up to July 1st, 1869. In December, 1869, the bank was robbed, and these bonds were stolen. In January, 1872, the plaintiff was appointed administratrix of William Ingram, and, Young having died, this action was brought to recover of his estate the value of the bonds. *Held*, that she could not recover; first, because Young acted as her agent, and was not chargeable on the testimony either with neglect or conversion in respect to the property; and second, because the plaintiff adopted and ratified his act in investing the money and depositing the bonds. *INGRAM v. YOUNG*. 487

— *Qualification of agent's authority.*
See AUTHORITY.

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- *Agent—when liable for sale of principal's property.*
See DAMAGES, 1.
- *Principal—when not bound by covenant of agent.*
See LEASE, 1.
- *When title of principal divested by acts of agent.*
See SALE, 1, 3.
- *Village corporation—water commissioners are agents of, and village is responsible for their acts—Knowledge of agent is knowledge of principal.*
See NEGLIGENCE, 8.
- *Unauthorized acts of agent—ratification of.*
See MARRIED WOMAN, 5.
- *Authority of agent to bind principal—When agent of insurance company has an implied authority to direct assured, how, when and where premiums shall be paid, and to bind company by such directions.*
See INSURANCE, 11.
- *Agent—authority of.*
See REMINGTON v. GERLING..... 619
- *When knowledge of attorney is not knowledge of client*
See ATTORNEY, 1.
- *When liable for negligence of servant.*
See DAMAGES, 2.

PRINCIPAL AND SURETY — *When party liable as principal, and not as surety.]* After the dissolution of a partnership, a creditor having knowledge of the dissolution, accepted the note of one member of the firm (who had purchased the interest of the other member and agreed to pay the firm debts), upon the agreement that if paid it would cancel the debt, but if not, that he should hold the firm for it.

The note was not paid. *Held*, that the other member of the firm was liable as principal debtor, and not merely as surety.

See PARTNERSHIP, 6.

- *Admission of principal—when admissible against surety.*
See EVIDENCE, 2.

— *Sureties—substitution of other than those mentioned in bid for public work, after acceptance of bid—when not allowed—Chap. 217, 1869; Chap. 619, 1870.*

See CONTRACT, 5.

— *Sureties on bond of assignee, given in pursuance of Chap. 347, 1860—liability of.*

See ASSIGNMENT, 2.

- *Surety on draft of corporation—when usury not available as defense by.*
See BILLS OF EXCHANGE.

— *Maker of premium note and insurance company have not such relation to each other.*

See INSURANCE, 4.

PROFITS — *Participation in—when makes man a partner.*

See PARTNERSHIP, 8.

PROMISSORY NOTE — *False representations—when a defense.]* 1. Action upon two promissory notes, made by defendants to the order of plaintiff's testator. Defendant set up as a defense, that the notes were given in part payment of a farm, purchased of the plaintiff's testator; that the party selling the land for him, represented the land sold to cover a certain cedar knoll, which the defendant asserts it did not, and that damages to a much larger extent than the notes had resulted. The proof showed that the notes were given after a full knowledge of the fact of the real extent of the land, and after efforts had been made, by those acting with defendants, to purchase the knoll, and that after the notes came due, promises were made to pay on a note given, as those were, with full knowledge or means of knowledge of

PROMISSORY NOTE—Continued.

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the extent of the purchase. *Held*, that the law will not sustain such a defense. *ISHAM v. DAVISON*..... 114

2. — *Payment—Taking collateral security to—when does not extend time of payment of—Error in charge—when immaterial.*] This action was brought against the defendants, as maker and indorser of a promissory note. The answer set up payment, that the plaintiff had accepted a third party (the firm of J. A. Charlton & Co.) as principal debtor for the note, and extended the time of payment with such third party, without defendants' consent or knowledge. The plaintiff received from the firm of Charlton & Co., a post-dated check, and, subsequently, a note for the amount of the note in suit, but the jury found that they were received as collateral security only, and that plaintiff did not accept the firm as principal debtor. At the trial, the court charged that "the mere giving or taking of a check or note by a third party, as collateral, does not of itself extend the time of the principal debtor." *Held*, that the charge, as applicable to the case, was correct. The defendants' counsel requested the court to charge the jury, that if they should find that the plaintiff agreed to accept the firm of Charlton & Co. for the payment of the note in suit, that firm having the defendant Troudden's money to that amount, such agreement was a payment of the note, and the court refused so to charge. *Held*, that it erred in so doing; that though the agreement, if made, would not have been technically a payment, yet it would have discharged the debt by way of accord and satisfaction; but that, as it appeared that the question whether or not such an agreement had been made, had been fairly presented to the jury in the charge of the judge, and they had answered it in the negative, that the judgment would not be reversed.

VAN ETTEN v. TROUDDEN..... 492

3. — *Usury.*] This action was brought upon a promissory note. The answers set up usury as a defense. The note was made by the defendant, Stokes, to raise money upon. The bank having refused to discount it, he applied to one Hill, who offered to discount it for a shave of six dollars, to which the defendant agreed. Hill then took the note and soon returned with plaintiff's check for the amount of the note, less legal discount, payable to the order of Stokes, who took the check to the bank, received the money, and paid Hill the six dollars according to agreement. Plaintiff had no knowledge that Hill received or was to receive anything from Stokes, nor did plaintiff receive or agree to receive the six dollars, or any part thereof. *Held*, that the plaintiff was entitled to recover. *VAN BUREN v. STOKES*..... 494

4. — *Alterations of—when material—when note avoided by.*] The defendant, J. K. Miller, made his promissory note for \$500, payable to the order of one Knapp, the note reading "I promise to pay," etc. Subsequently Knapp, without the knowledge or consent of J. K. Miller, persuaded the defendant, P. Miller, to sign her name to the note, under the name of J. K. Miller. Afterward, and before its maturity, the note came into the hands of the plaintiff, a *bona fide* purchaser, for a valuable consideration, without notice. In an action brought by him upon the note, *held*, that he was entitled to recover against both of the defendants. That the addition of P. Miller's name to the note was not a material alteration thereof, and did not render it invalid as to the original maker. *CARD v. MILLER*..... 504

5. — *When possession of, necessary to a recovery on.*] This action was brought on a promissory note, made by the defendant, payable to the plaintiff or bearer. At the trial, the note was produced by a witness, who claimed to own it as administrator of an estate, while the plaintiff testified that he owned the note, and that it had never been transferred or paid. *Held*, that the plaintiff was not entitled to recover as he had not possession of the note and it was not lost. *CRANDALL v. SCHROEPFEL*..... 557

6. — *Right of party paying, to have it surrendered or destroyed.*] A party paying a promissory note, or negotiable bill, is entitled to the delivery of such note or bill, on payment, or its production, that it may be discharged or destroyed in his presence. *Id.*

7. — *Injunction to restrain transfer of—Service by publication.*] This action was brought to restrain the defendant, the bank, from returning a promissory note, made by the plaintiff, to the defendant Lewis, and by him

PROMISSORY NOTE—Continued.

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sent to the bank for collection. The suit was commenced after the maturity and dishonor of the note. Lewis resided in Pennsylvania, and had never been served with process, or in any way appeared in the action. The complaint alleged that the note was obtained by fraud, that the consideration for which it was given had failed, and that, "if said note is permitted to be returned to said defendant Lewis, it will be a means of annoyance to the plaintiff; it may get into the hands of innocent parties, who will be defrauded thereby, and it may, and doubtless will, be used to injure the plaintiff in his credit and in his business." *Held* (1.) That the plaintiff had a perfect defense at law. (2.) That the facts stated did not justify an apprehension that Lewis would make an improper use of the note, and that plaintiff was not called upon to protect third parties who might be defrauded by Lewis. (3.) That the action could not be maintained, for the reason that Lewis had not been served with process. (4.) That an order of the Special Term, dissolving a temporary injunction granted in the action, was proper and should be affirmed. *GALUSHA v. FLOUR CITY NATIONAL BANK*..... 578

8. — *Accommodation indorser—when not liable to party having notice.*] A party having notice of the fact that a note has upon it an accommodation indorser, and who does not part with anything upon the faith of its transfer to him, stands in no better position than the maker, and cannot recover thereon against the indorser. *POWERS v. FRENCH*..... 582

9. — *Consideration for, will be presumed.*] The distinction between a promissory note and other contracts, is, that in the former a consideration will be presumed, and in the latter it must be proved. *Id.*

10. — *Answer in action on—admission in, of making, indorsement and transfer of note—effect of.*] An admission in the answer, of the making, indorsement and transfer of a promissory note, does not preclude the defendant from showing that there was no consideration; that the indorsement was lent; and that the consideration paid by the plaintiff was in fact the money of the party to whom the indorsement was lent. *Id.*

11. — *Given to compromise felony—bona fide owner of—Evidence—order of reception of.*] In an action upon a promissory note, the defense was set up, that it was given to compromise a felony. The court refused to allow the defendant to show this fact, unless he first showed that the plaintiff was not a bona fide owner of the note. *Held*, that this was not an error—that the court had a right to determine the order in which evidence should be introduced—and that, as the facts which the defendant offered to show would not constitute a defense unless the plaintiff was shown not to be a bona fide purchaser, it was proper that the latter fact should be first shown.

HILL v. NORTHRUP..... 612

12. — *Guaranty—when void because consideration is not expressed in it—in action on, insolvency of maker of note may be shown.*] A guaranty, written upon a promissory note in the words, "I hereby guarantee that the above note is not outlawed, according to the laws of the State. [Signed] Isaac Hampton," is invalid, no consideration being expressed in it. In an action thereon, it is proper to show, on the question of damages, that the maker of the note is insolvent, and that a judgment against him cannot be collected.

CLARK v. HAMPTON..... 615

13. — *Complaint in action against indorser—what must be alleged in.*] This action was upon a promissory note made by S. & M., payable to the order of the plaintiff, and indorsed by the defendant. The complaint alleged that the plaintiffs were the owners of the note, and "that the defendant indorsed said note at the time of the making thereof." The note was set out in full, but a copy of the indorsement was not given. The defendant demurred. The plaintiffs moved for an order directing judgment for them, on the ground that the demurrer was frivolous, which was granted. *Held*, that this was error; that in order to entitle the plaintiffs to recover, it was necessary for them to allege the special circumstances charging the defendant as first indorser, to rebut the presumption that he was second indorser.

WOODRUFF v. LEONARD..... 622

PROMISSORY NOTE—Continued.

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— *More possession of by agent, unindorsed, does not confer authority to receive payments thereon — Payments to agent upon — when binding on principal.*

See PRINCIPAL AND AGENT, 5, 6.

— *Alteration of — when immaterial.*

See HUNT v. MITCHELL..... 621

— *Secured by chattel mortgage — bona fide purchaser of, takes the mortgage as he takes the note, free from equities existing in favor of third parties while held by the mortgagees.*

See CHATTEL MORTGAGE, 5.

— *Of married woman — liability on.*

See MARRIED WOMAN, 2.

— See INSURANCE, 1; JURY, 1; PARTNERSHIP, 1, 2.

PUBLIC POLICY — Contracts in relation to bounties, when void as against.

See BOUNTIES.

PUBLICATION — Of summons — service by — Code, § 135, sub. 4 — when cannot be applied.

See GALUSHA v. FLOUR CITY NATIONAL BANK..... 573

QUALIFICATION OF AUTHORITY — When allowed.

See AUTHORITY.

QUANTUM MERUIT — Action for services — specific prices agreed upon.]

Action by plaintiffs to recover commissions for services rendered in selling certain real estate for defendant. The complaint was in form upon a *quantum meruit*, the allegation being that the sum named, the plaintiffs reasonably deserved for their services. The court instructed the jury that they could not find a verdict for less than the full amount claimed, to which instruction the defendant excepted. *Held*, that as the evidence showed that a price was agreed upon, and there was no other evidence on the subject of what the services were worth, the instruction was proper. The specific price for the services became the *quantum meruit*. LUDLOW v. DOLE..... 715

RAILROAD COMPANY — Lands of — trespasser on — duty of company toward — Contributory negligence — License.]

1. The plaintiff, while crossing defendant's track, in the evening, at a point where a street was to be, but had not yet been laid out, but where people were in the habit of crossing and recrossing, was struck by one of defendant's engines and injured. *Held*, that he was guilty of contributory negligence in going upon defendant's track, and that he could not recover.

The court charged that, even if the public had no right to use the land of the defendant, at the place where the plaintiff was injured, yet, if people were in the habit of crossing and recrossing there, that the company was bound to use care and caution in running at that point. *Held*, that this was error; that no right could be acquired by the public in such a manner, without evidence of notice to the company and subsequent acquiescence by it.

Even if there was any evidence from which a license might be inferred, such license created no legal right and imposed no duty upon the defendant, except the general duty, which every man owes to others, to do them no intentional wrong or injury. MATZE v. N. Y. CENT. & HUD. R. R. Co..... 417

2. — *Real estate — when company cannot take without owner's consent.]*

Under the statutes authorizing railroad companies to acquire title to real estate without the owner's consent, a company cannot take land simply for the purpose of removing gravel therefrom, to be used in constructing a distant portion of its road. N. Y. AND CANADA R. R. Co. v. GUNNISON..... 496

— *Duty of, to maintain fences and cattle-guards.*

See NEGLIGENCE, 4.

RAPE — Virginity — of person ravished — immateriality of, on trial.]

1. On the trial of an indictment for rape, the judge charged the jury that if they believed, from all the evidence, that the complainant was not a virgin, it did not lessen the crime in the slightest degree. *Held*, to be a correct charge.

HIGGINS v. THE PEOPLE..... 307

RAPE — Continued.

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2. — *Concealment of fact of — presumption from.*] In case of rape, if the party ravished conceal the fact for any considerable time after an opportunity to explain, except from fear, this and like circumstances afford a strong, though not conclusive, presumption that her testimony is feigned. *Id.*

3. — *False testimony — effect when given willfully.*] It is not true, as a rule of law, that if the complainant has been contradicted by competent and reliable witnesses in any one of the material facts sworn to by her, the jury should discredit her testimony in every particular. The rule, false in one thing false in all, only applies when the witness willfully or designedly testifies falsely. *Id.*

RATIFICATION — *Promissory note — payment on, to agent — when knowledge by principal of one such payment, is ratification of act of agent, in receiving other payments.*

See PRINCIPAL AND AGENT, 6.

— *When silence of party upon claim being made, is not ratification of, and acquiescence in claim.*

See PRINCIPAL AND AGENT, 7.

— *Of unauthorized acts of agent.*

See MARRIED WOMAN, 5.

REAL ESTATE — *Title to — when acquired by possession.*

See TITLE, 1.

— *Proceeds of sale of, in partition — when considered as realty.*

See WILL, 7.

RECEIPT — *Mistake in making — not observing contents of — negligence.*

See NEGLIGENCE, 2.

— *Party not estopped by.*

See INSURANCE, 6.

— *Of Express Co. — limitation of liability by.*

See COMMON CARRIER.

— *Evidence of fact that the party had given another receipt without receiving the goods not admissible to show that goods were not received in this case.*

See EVIDENCE, 8.

— See WAREHOUSE RECEIPT.

RECEIVER — *Of corporation — how appointed. Chap. 151, 1870.*] 1. The provisions of chapter 151. of the Laws of 1870, cover all the cases mentioned in title 4, chapter 8, part 3, of the Revised Statutes, providing for the appointment of a receiver of a corporation upon the petition of a judgment creditor, after execution returned unsatisfied; and, since the passage of said act, the remedies therein provided must be pursued.

The plaintiff recovered a judgment against the defendant, upon which execution was issued, and returned wholly unsatisfied. Upon an affidavit showing these facts, and that the defendant was insolvent, he then applied, upon motion, eight days' notice of which had been given, for an order appointing a receiver. The motion was granted, and a receiver appointed. *Held*, that the proceedings were irregular, as not being authorized by section 8, of chapter 151, Laws 1870, and that the order appointing the receiver should be reversed. *CLINCH v. SOUTH SIDE R. R. Co.* 686

— *Under R. S., relative to limited divorces, court not authorized to take possession of property of husband, for maintenance of wife, through medium of a receiver, in the first instance.*

See DIVORCE, 8.

RECEIVER OF STOLEN GOODS — *Scienter — what evidence of, allowed — When declarations of prisoner as to collateral facts may be proven, and their falsity shown.*

See CRIMINAL LAW, 9, 10; INDICTMENT, 1, 2.

RECORD — *Required for a review.*

See CRIMINAL LAW, 4.

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- REFEREE**—*Power of, to receive evidence and reserve his decision as to objections to it.*] 1. At the trial, evidence objected to by the defendant, was received by the referee, subject to his retaining or rejecting it at the conclusion of the case. *Held*, that, as the evidence so received was competent, this decision could not operate injuriously, or in any way affect the defendant's rights; it must be considered the same as if the evidence had been admitted absolutely, which would have been entirely proper.
- KERSLAKE v. SCHOONMAKER**..... 436
2. — The appointment, by the court, of a referee, nominated by one party and approved by the other, is no violation of rule 73, and no irregularity. **WHITE v. COULTER**..... 357
3. — *Duty of, in reserving decision as to admission or rejection of evidence.*] Where a referee receives evidence objected to, reserving the question of its admissibility, he ought, before closing the case, to make his final ruling, receiving or rejecting the evidence, and advise the parties, so that the proper exception may be taken. Failing to do this, the court, on motion, might open the case and send back the report, or, on appeal, treat the action of the referee as error, when the evidence was so far material that it may have had some influence on his findings. **BERRIAN v. SANFORD**..... 625
4. — *Report—when set aside.*] Two actions were pending between the same parties, one in the Court of Common Pleas, and the other, the present action, in this court, both of which were referred to the same referee. An order was made by the referee that the issues in the action in the Common Pleas should be tried first, and that if they were decided against the defendant, that then an accounting should be had to determine the amount due. The actions were tried before the referee, who subsequently filed his report, and directed that judgment be entered for the plaintiff in the action in this court. The defendant applied to have the report set aside, claiming that he had been misled, that he understood the order to apply to both actions, and that he had therefore failed to introduce proof as he had intended to do at the proper time, to reduce the amount of plaintiff's demand. The motion was denied. Upon appeal to the General Term, *held*, that its denial was error. That as it appeared that defendant had been misled, that an order should be entered vacating the report so far as it related to the amount of the recovery, and directing the referee to proceed to try and determine the question as to the amount the plaintiff is entitled to recover.
- DEVOE v. NUTTER**..... 713
- *Ex parte examination of witness before—adverse party cannot interfere to prevent.*
- See WITNESS, 2.
- *In proceeding to punish for contempt, for violation of injunction—when it is his duty to take proof as to, and determine the extent of, the loss and injury sustained.*
- See INJUNCTION, 1.
- *Power of, to allow amendments to complaint on contract.*
- See CONTRACT, 2.
- REFERENCE**—*Interlocutory decrees—practice formerly in Court of Chancery.*] 1. The practice which formerly prevailed in the Court of Chancery, of determining the rights of parties to suits in equity, in the first instance, upon the hearing, by an interlocutory decree, and then, when necessary, referring the case to a master, to take and state the account, still continues in force. A report of a referee, made in this manner, sustains all the relations to the case the former interlocutory decree did, in hearings had in the Court of Chancery.
- MUNDORFF v. MUNDORFF**..... 41
2. — *Duty of referee when whole issue referred.*] Ordinarily, where the whole issue is referred, it is the duty of the referee to take, state and adjust the accounts of the parties on the basis on which, by his decision, he may settle their rights. *Id.*
3. — *Interlocutory report.*] But where, for any reason, this is not done, and an interlocutory report only is made, by which the rights of the parties are determined, and a further hearing is directed to settle the accounts

REFERENCE — Continued.

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between them, the court has power to direct that to be done before another referee. *Id.*

4. — *Review.*] Such decree may now be reviewed at General Term, by a motion for a new trial. *Id.*

5. — *Exception to ruling of referee.*] Where an exception to a ruling or direction of a referee is specific, resting on special grounds and reasons, no objection to the ruling or direction, except those so specified, will be considered upon appeal. *UNION MANUFACTURING COMPANY v. BYINGTON* 44

6. — *Order of — Long account.*] The complaint contained two counts, each for work, labor and materials. The services were performed, and materials furnished, in engraving and printing a large number of bonds, coupons and certificates. From the schedule appended to the complaint, it could not certainly be determined whether the cause was referable. Plaintiff's agent made an affidavit, which was used on the motion, which stated positively that the trial of the action would require the examination of a long account. The answer was a general denial, and the affidavit of plaintiff's agent was in no way controverted; *held*, that the court had sufficient before it, to justify the making of an order referring the cause.

BANK NOTE COMPANY v. INDUSTRIAL EXHIBITION COMPANY..... 118

7. — *Referee — when appointed to take affidavit to be used on ex parte motions.*] A referee will not be appointed to take the affidavit or deposition of any person to be used upon an *ex parte* motion. *DE HART v. HATCH* 288

8. — *Order of — what unauthorized*] A decree, giving a construction to a will and appointing a referee, and also making him a receiver, with power to carry his decision into effect without previously making his report to the court for confirmation, in an action brought for the construction of a will, for an accounting, sale of real property, and for other relief, goes further than is usual, and should be modified by making the reference to the referee merely interlocutory, with direction to report to the court upon all the facts, matters, etc. *FISHER v. HUBBELL*..... 610

— *To compute damages under injunction.*

See ACTION, 1.

REFORMATION OF CONTRACT — What must be shown, to authorities.]

To authorize a reformation of a written instrument, solemnly executed, there must not only be a plain mistake, but it must be shown that the part omitted or inserted in the same, was omitted or inserted contrary to the intention of the parties, and under a mutual mistake. *PHILLIP v. GALLANT*..... 528

REGISTRATION — Of vessel.

See TAXATION.

REMAINDER — When vested.

See WILL, 1, 6.

— *Vested remainder — when created.*

See PARTITION, 2.

REMEDY — By mandamus, an exceptional one.

See MANDAMUS, 2.

— *For defective performance of contract.*

See PERFORMANCE, 1.

— *For excessive damages, awarded in action of tort.*

See DAMAGES, 3.

REMOVAL OF CAUSE — 1 U. S. Statutes at Large, p. 79, sec. 12, Act of 1789 — residence of National Bank within meaning of — Entry of an appearance — what constitutes — Motion papers — defects in copies — when disregarded.] A national bank, organized under the acts of congress, is a resident of the State in which it is located and does business, within the meaning of the act of 1789, authorizing the removal of causes into the United States courts.

The plaintiff's attorneys opposed a motion, made by the defendant, for the removal of this cause into the United States court, on account of certain

REMOVAL OF CAUSE—*Continued.*

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defects in the copies of the papers served upon them. *Held*, that as the defects did not exist in the papers themselves, on which the application was made, that they were properly disregarded.

On the 15th of December, 1873, a notice of the defendant's appearance in this action was served upon the plaintiff's attorneys. *Held*, that the mere notice of an appearance was not the *entering of an appearance* required by the act of congress, nor a sufficient compliance with Rule 7 of this court.

The petition, filed by the defendant for the removal of the cause, contained the statement that it then entered its appearance and had not done so before; and the order requiring the plaintiff to show cause why the application should not be granted, recited the fact that the defendant, on the day of its date, had entered its appearance; *held*, that these statements sufficiently showed an entry of appearance, and that, even if they did not, procuring the order and making the motion were equivalent to the entry of an appearance within the technical meaning of the term. (BRADY, J., dissenting.)

CHATHAM NAT. BANK v. MERCHANTS' NAT. BANK 703

RENT—*When apportioned.*

See LANDLORD AND TENANT, 3.

REPLEVIN—*Levy—when sufficient to sustain action of.*

See LEVY, 1.

RES ADJUDICATA—*When case not.*

See HABEAS CORPUS.

RESCISSIION OF CONTRACT—*When allowed—party must be able to restore what he has received.*

See CONTRACT, 1.

RETROSPECTIVE—*Statutes when.*

See STATUTES, 14.

RETURN—*Presumption from appearance of prisoner at trial.*

See CRIMINAL LAW, 2.

REVIEW—*Formal judgment-record required for.*

See CRIMINAL LAW, 4.

REVIVOR—*Action—motion to revive, denied.*

See ACTION, 1.

SALARY—*Payment by city to person in possession of the office—Right of the board of aldermen to judge of the election of its own members.*] The plaintiff claimed to have been elected assistant alderman. The board of assistant aldermen decided in favor of his opponent, who was admitted to the board, discharged all the duties of the office, and received the salary thereof; in a *quo warranto*, brought on the relation of plaintiff against his opponent, it was decided that the plaintiff was entitled to the office; he never occupied nor performed any of the duties of the office. This suit was brought to recover the salary attached to the office for the term during which he claimed to have been elected; *held*, that he could not recover; that his remedy, if he had any, was against those who received the salary, or who wrongfully excluded him from the office. *McVEANY v. MAYOR OF N. Y.* 35

SALE—*Of goods by one having no title—liability of purchaser—When title of true owner vested by.*] 1. A broker applied to the plaintiff to purchase certain goods, claiming to act for the defendant. Plaintiff agreed to sell them, gave an invoice of them to the broker, and delivered the goods, by his own carman, at the defendant's store, the clerk receiving them giving a receipt, which stated that the goods were received from the plaintiff. The broker, having fraudulently induced the defendant to believe that the goods were his, received from him their full value; *held*, that the plaintiff had not *vested* the broker with any evidence of title, nor put it in his power to *give* the defendant and induce him to purchase the goods under the *impression* that they were the broker's property, and that plaintiff could recover defendant the purchase-price of the goods. *BASSETT v. LEDERER.* 274

SALE—Continued.

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2. — *Evidence of good character.*] The defendant was permitted to introduce evidence, to show that the broker's character was good, for honesty and fair dealing. *Held*, that this was error. *Id.*

3. — *Fraudulent—Agent—private instructions to—Evidence of title.*] A broker applied to the plaintiff to purchase certain goods, claiming to act for the defendant. The plaintiff agreed to sell them, gave an invoice of them to the broker, made out in defendant's name, and delivered the goods, by his own carman, at the defendant's store, the clerk receiving them giving a receipt, which stated that the goods were received from the plaintiff. The broker, having fraudulently induced the defendant to believe that the goods were his, received from him their full value. *Held*, that the plaintiffs had not invested the broker with any evidence of title, nor put it in his power to deceive the defendant and induce him to purchase the goods under the belief that they were the broker's property, and that plaintiffs could recover of the defendant, the purchase-price of the goods.

GALLUP v. LEDERER..... 282

4. — *Damages.*] Defendant purchased and received the goods at thirty cents per yard. The court charged the jury that the plaintiff was entitled to recover the market value of the goods at the time they were demanded of the defendant. *Held*, that this was error; that the broker was authorized to sell, and the action was to recover upon the sale made, and, in theory, it affirmed the sale and bound the plaintiff by its terms. *Id.*

5. — *Delivery.*] This action was brought to recover the price of certain whiskey, sold and delivered by the plaintiff to the defendant.

The defendants disputed the price, denied that the delivery was complete, and alleged that the goods were seized by the United States Government, by reason of certain unlawful acts of the plaintiff. The action was referred, and the referee found that the sale and delivery were complete, and determined the value of the goods. *Held*, that "the evidence fully sustained the referee in his finding," and "that without proof that the whiskey was seized by the United States Government for the plaintiff's acts, or his omissions to act, the defendant was liable." *DEVLIN v. CHARY*... 489

— *Conditional sale—when made in good faith, condition sustained as against creditors of vendee.*

See *CONDITIONAL SALE*, 2.

— *Between principal and agent, when sustained.*

See *PRINCIPAL AND AGENT*, 2.

— *Conditional sale—machine to be tried.*

See *CONDITIONAL SALE*, 3.

— *Of property won on a wager—when title does not pass to purchaser*

See *WAGER*.

— *Of lands—specific performance of contract for, when obligations are not reciprocal.*

See *CONTRACT*, 11, 12.

— *Statute of frauds—delivery.*

See *PETRIE v. DORWIN*..... 617

— *Statute of frauds—When contract is one of sale, and void under statute of frauds, and not one for work and labor to be performed.*

See *STATUTE OF FRAUDS*, 2.

— *Fraudulent—rights of bona fide purchasers.*

See *WAREHOUSE RECEIPT*.

— *Conditional.*

See *CONDITIONAL SALE*.

— *Of lands—when fraudulent, party entitled to recover back money paid.*

See *CONTRACT*, 8.

SCHOOL TAXES—*Seizure of property by collector of, without proper notice—remedy of party aggrieved—Chapter 555, 1864—Costs—when not allowed.*
See *TAXES*.

- SCIENTER** — *What evidence of allowed.*
See CRIMINAL LAW, 9. Pam.
- SEAL** — *Contract under — time of performance may be extended by parol.*
See CONTRACT, 9.
- *Necessity of, to writ of mandamus.*
See MANDAMUS, 6.
- SECURITIES** — *Deposited in Insurance Department.*
See INSURANCE, 7.
- SENTENCE** — *Asking prisoner prior to, if he has anything to say.*
See CRIMINAL LAW, 3.
- SEPARATE ESTATE** — *Of married woman — When bound.*
See MARRIED WOMAN.
- SERVICE** — *Of notice of motion to set aside judgment for divorce — on whom made after decease of plaintiff.*
See PRACTICE, 3.
- *Notice of appeal — service of, on one partner is sufficient.*
See MILLER v. PERRINE. 620
- SET-OFF** — *Against executors — Section 23, title 2, chapter 6, part 3, Revised Statutes.] 1. In an action brought by an executor upon a cause of action arising after the decease of the testator, the defendant cannot set off a demand against the testator, even although such demand existed at the time of the testator's death. In order to authorize such set-off, the demand must not only be sued by the executor, but it must be upon a cause of action which had accrued at the time of the decease of the testator or intestate.*
PATTERSON v. PATTERSON. 623
2. — *Of cause of action arising from tort — how may be pleaded — Assignee of cause of action.] An action of assumpsit lies for money obtained by oppression, imposition, extortion or deceit; and the demand for the money so obtained, may be set up as a set-off in an action brought by the party against whom it exists. The assignee of such party takes a cause of action subject to such defense of set-off. In setting off a cause of action, in form, in assumpsit, but arising from tort, it is proper to set forth the fraud and collusion upon which the cause of action depends. HARWAY v. THE MAYOR. 626*
- *When lien of attorney for costs, on a judgment, is subject to right of set-off.*
See ATTORNEY, 2.
- *Of judgment — when right of, attaches.*
See ATTORNEY, 2.
- SETTLEMENT** — *Of bill of exceptions.*
See BILL OF EXCEPTIONS, 1, 2, 3, 4.
- SHEEP** — *Liability of owner of dog for injuries to — evidence as to companionship of dogs.*
See DOGS.
- SHIPS AND VESSELS** — *Power of State courts to enforce demands of a maritime nature — how limited — Chapter 482, 1862.] In an action brought upon a bond given by defendants, to procure the discharge of an attachment issued against an ocean-bound vessel, under the provisions of chapter 482, Laws of 1862, to enforce a claim for materials furnished and work and labor performed, for and toward the building, repairing, fitting, furnishing and equipping of the vessel, held, that so much of the statute as authorized the proceedings to be taken against the vessel for the recovery of the plaintiff's debt, as one for repairs, was unconstitutional and invalid, but so much thereof as authorized them to be taken for the recovery of so much of the demand as was for building the vessel, was constitutional and valid.*
MURPHY v. SALEM. 146
- *Lien on — materials furnished in this State, but vessel constructed in another.*
See LIEN, 2

SITUS— *Legal, of vessels, for taxation.*
See **TAXATION**, 1.

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SPECIAL TERM— *Place of holding— Trial had at, in place different from that specified in notice of trial.*] 1. Where an action was noticed for trial, at a Special Term to be held at the chambers of a justice of the Supreme Court, in the town hall, and, at the appointed time and place, the action was, by the consent of the parties, tried before another justice, at an adjourned Special Term then held by him in another room of the town hall; *held*, that if there was any irregularity in so doing, it was waived by the appearance and consent of the defendant's attorney. **WHITE v. COULTER**..... 387

2. — *Order of, conflicting with a judgment of the General Term, of no effect and not binding.*] In an action heretofore brought, in this court, to which the plaintiff and her husband were defendants, it was decided at the General Term, reversing the judgment of a referee, that they were entitled to a life estate in the land, for damages to which, this action was brought, and to a deed conveying the same to her and her husband, to have and to hold the same so long as they, or either of them, should live. This judgment was affirmed in the Court of Appeals, and judgment absolute ordered for the defendants; on filing the remittitur, an order was made at the Special Term directing the land to be conveyed to Julia Ann Freeman, the plaintiff, for her natural life. *Held*, that in so far as this order directed her to receive a greater or different interest than that authorized by the judgment of the General Term, it was of no effect, and not binding on the parties.

FREEMAN v. BARBER..... 433

— *Power of.*
See **ORDER**.

SPECIFIC PERFORMANCE— *Liens— discharge of, before tender.*] 1. An action for specific performance cannot be maintained, when, at the time the contract is to be performed, there are existing liens on the premises to be conveyed, which are not provided for in the contract, although the holders agree to discharge them on receiving an assignment from the seller, of the obligation to be executed by the purchaser under the provisions of the contract to him. **REEDER v. SCHNEIDER**..... 131

2. — *Vendee— lien of, for purchase-money— Lis Pendens— who bound by judgment recovered after filing of.*] The defendant, Stevenson, brought an action against the defendant, Spratt, for the specific performance of a contract for the sale of certain real estate to him, notice of pendency of action being duly filed on the 29th of April, 1871, and on the 10th of June, 1872, a judgment was entered in his favor therein, by which it was adjudged, that, as the defendant, Spratt, was unable to specifically perform the said contract, the amount recovered thereby, should be a lien on the surplus moneys arising from a sale of the premises under a prior mortgage lien, from the time of the filing of the *lis pendens*. On the 18th of May, 1871, the defendant, Bowne, recovered a judgment against Spratt, which was duly docketed. The premises having been sold under a mortgage which was prior to the rights of either of these parties, *held*, that the defendant, Stevenson, had a lien upon the surplus moneys arising upon the sale, which was prior to that of Bowne, and that the judgment recovered by Stevenson, was evidence of this priority against Bowne, because the latter acquired his lien, under the debtor and vendor, after the notice of *lis pendens* in the action was filed.

HULL v. SPRATT..... 202

— *Of contract for sale of land— when not decreed, where there is not mutuality of obligation.*
See **CONTRACT**, 11.

STARE DECISIS— *Principle of— importance of— when departed from.*] In this action, brought by the plaintiff to recover for services rendered as an officer in the Court of Common Pleas, his appointment as such having been made under and by virtue of section 9, of chapter 882, of the Laws of 1870, the complaint was dismissed at the trial. *Held*, that as, when this case was before the General Term on a former appeal, the act, under which the plaintiff was appointed, was declared unconstitutional, and from that deci-

STARE DECISIS — *Continued.*

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sion no appeal was taken, the order should be affirmed, on the principle of *stare decisis*.

That principle is one of great importance in the administration of justice, and should not be departed from, except in extreme cases founded upon some change in the law of the land, either by legislation or by courts of last resort, or when the court is satisfied that an erroneous conclusion has been declared. *BRENNAN v. MAYOR OF N. Y.*..... 315

— *See* *MCGRATH v. R. R. Co.*..... 437

STATUTE OF FRAUDS — *What sufficient memorandum within.* 1. The plaintiff sold to defendant, Lockwood, a \$20,000 bond and mortgage, and assigned to him, at the same time, a \$2,000 bond and mortgage, as collateral security thereto. At the same time, the plaintiff and the defendant, Alcott, executed an agreement, under seal, by which, after reciting that the plaintiff was indebted to the defendant, Wehrum, in the sum of \$2,000, and that the defendant, Alcott, had become security for the payment of said money, it was agreed that Lockwood should hold the \$2,000 mortgage, after payment of the \$20,000 mortgage, to secure Alcott for his liability as security. *Held*, that this was a sufficient memorandum within the statute of frauds; that the defendant, Alcott, thereby became security to Wehrum for plaintiff's debt to him; and that he was entitled to the proceeds of the \$2,000 mortgage.

KUHN v. BROWN..... 244

2. — *Sale — when void under — Distinction between contract of sale and one for work and labor to be performed.* Defendant being desirous of purchasing a stallion colt, owned by the plaintiffs, agreed that, if they would have him altered and keep him until he got well, he would give them \$1,000 for him. The plaintiffs caused the colt to be altered, and, after his recovery, tendered him to defendant, who refused to receive him. *Held*, that the contract, being oral, was within the statute of frauds and void; that it was a contract of sale, and not for work and labor to be performed.

When the thing bargained for is not *in esse* at the time of the contract—could not then be delivered and accepted—but is to be afterwards manufactured or constructed, the contract is held to be one for work and labor, but, where the subject of the contract exists at the time *in solido*, but something is agreed to be done to it, to put it in condition for use, or to make it marketable, the contract is held to be one of sale, and void within the statute. To this rule there are perhaps some exceptions.

BATES v. COSTER..... 400

3. — An agreement by which A. is to perform work for B., for which, payment is to be made after the death of B., is valid under the statute of frauds. *KENT v. KENT*..... 529

— *Sale — delivery.*

See *PETRIE v. DORWIN*..... 617

— *Agreement to answer for the debt of another.*

See *WATSON v. PARKER*..... 618

— *Contract taken out of, by payment of part of purchase-price.*

See *COMPROMISE.*

STATUTE OF LIMITATIONS — *Effect of, on lien of assessment — In the absence of an adverse possession, the possession follows the legal title, and § 78, of the Code, is to be read in connection with § 81.*

See *WOOD v. SQUIRES*..... 481

STATUTE OF USES AND TRUSTS — *What trusts not affected by — When trusts arise by implication of law — Conveyance by trustee to cestui que trust — when fraudulent, as to creditors.* In 1868, Sarah Mallory, the mother of the defendant, Russell, was the owner of a lot of forty-one acres, and had an interest in certain other real estate in connection with her said son, who desired her to unite with him in the sale of the latter, and allow him to receive and enjoy the proceeds of such sale, for his own use and benefit. It was finally orally agreed that this should be done, and, in consideration thereof, the said Russell, the heir-at-law of the said Sarah, agreed that upon her death, he would convey the forty-one acres to his son, the defendant, F. E. In pur-

STATUTE OF USES AND TRUSTS—Continued.

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suance of this agreement, the sale was made. Sarah died in September, 1868, intestate. In November, 1870, the defendant, Russell, without any intent to cheat or defraud his creditors, conveyed the forty-one acres to his said son, by deed, which was recorded November 26, 1870. Prior to that time the plaintiff had commenced actions against the said Russell, in which he subsequently recovered judgments. This action was brought, to have the conveyance set aside. *Held*, that the complaint was properly dismissed. That upon the death of Sarah Mallory, the land descended to Russell, as her heir-at-law, and he held the same, as trustee for his son. That his agreement to convey the same was founded upon a valuable consideration, and would be enforced by a court of equity. And that as the trust arose by implication of law, it was not invalidated by the statute of uses and trusts.

NORTON v. MALLORY..... 494

STATUTES—Section 186, chapter 86, 1813—2 R. S., 422, § 186—Mandamus denied when action can be maintained.] 1. The commissioners appointed under this act, can, by virtue of the provisions of the said act, maintain an action against the city to recover for their services and expenses in opening, widening and extending streets, and their applications for writs of peremptory mandamus were, therefore, properly denied. *PEOPLE v. GREEN*..... 1

2. — *Employes of commissioners have no claim, as such, against city.*] By the provisions of this act the commissioners were required to cause all such surveys, maps, profiles, plans and other things as they might judge necessary to be done, to be made and prepared for their use. *Held*, that for the services so performed, the statute does not secure to the person or persons performing them the right to resort to the city itself, or the fund to be created by the commissioners' assessments, for compensation, nor have the commissioners power to invest the persons so employed by them, with such right. *Id*

3. — *Remedy of employes.*] The sole and exclusive remedy of the person so employed, is the presentation of his claim by the commissioners, as a portion of their expenditures, and its satisfaction by their disbursement of the amount received for that purpose. Whether even that remedy is not lost by the taxation of the commissioners' bill, without including these claims at the same time, *quere*. *Id*.

4. — *Section 104, chapter 137, 1870—Contract—when made without advertising, as statute requires, void.*] The plaintiff entered into a contract with the commissioner of public works, for laying water-pipes in the city of New York, and performed work and furnished materials thereunder. The contract was not founded upon sealed bids or proposals, made in compliance with public notice, as required by section 104. *Held*, that the contract was void.

5. — *Stillwell act not abolished.*] Article 5, of chapter 5, title 1, part 2, of the Revised Statutes, entitled "Of voluntary assignments," was not abolished by the passage of the non-imprisonment act of 1831 (the Stillwell act).

PEOPLE v. FANCHER..... 27

6. — *Chapter 580, 1872—Section 38, of chapter 446, 1857—Chapter 308, 1861—Contract by commissioner of public works—when void under acts of 1857 and 1861.*] On the 27th of September, 1870, the commissioner of public works, in behalf of the city, entered into a contract with the plaintiff for regulating, grading and setting curb and gutter stones in Tenth avenue, from Manhattan to One Hundred and Fifty-fifth street, and flagging the sidewalk thereof, without complying with the provisions of section 38 of chapter 446 of the Laws of 1857, and chapter 308 of the Laws of 1861, requiring all contracts to be founded on sealed proposals, in compliance with public notice; *held*, that the contract was void. *BROWN v. MAYOR OF N. Y*..... 34

7. — *Section 1, chapter 383, Laws of 1870—authority of commissioners of public works under.*] Section 1, of chapter 383, of the Laws of 1870, contains the following clause: "The commissioner of public works is hereby directed to immediately contract for the regulating and grading of the Tenth avenue, from Manhattan street to One Hundred and Fifty-fifth street;" *held*, that as the contract in suit provided for the setting of the curb and gutter stones and flagging the sidewalk, as well as for regulating and paving the avenue, it was unauthorized by the statute and void.

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Seemle, that the statute merely authorized the commissioner to contract, without preliminary action of the common council or other local authority. It did not direct the manner of contracting, and the contract should, therefore, be made in compliance with the existing laws, and not arbitrarily, on such terms and with such persons as the commissioner might choose. *Id.*

8. — *Chapter 580, Laws of 1872—certificate of commissioners appointed under—what it must contain.*] The commissioners, appointed under chapter 580, of the Laws of 1872, indorsed upon the plaintiff's contract, a certificate that they were "satisfied that there has not been any fraud in relation to the making or entering into the said contract;" *held*, that this was not sufficient, the statute requiring them to certify that "they are satisfied that no fraud has been perpetrated in relation thereto or in the performance thereof." *Id.*

9. — *Chapter 408, 1867—Provisions of, when held to be directory.*] By chapter 408, of the Laws of 1867, Madison avenue was laid out and extended from Eighty-sixth, to One Hundred and Twentieth street; its precise location, width and extent being prescribed by the first section. By the second section, it was made the duty of the corporation counsel, within three months after the passage of the act, to take the necessary legal means to open the street. *Held*, that the provision, as to the time within which the proceedings should be commenced, was directory merely, and that the time mentioned was not essential to the validity of the proceedings, if they were, in all other respects, afterwards properly taken. *STEVENSON v. MAYOR OF N. Y.*, 51

10. — *Opening of streets under special statute—Resolution of common council—omission to publish it under special statute.*] The resolution of the common council, directing the corporation counsel to take proceedings to open the street, was not published in all the corporation newspapers prior to its adoption, as required by the charter. *Held*, that, as the improvement was fully provided for by the act, and the proceedings taken conformed to it, though not instituted within the time required by it, they were valid and effectual, without any resolution of the common council, and the omission to publish it, as the law requires in other cases, in no way impaired the authority which the statute provided for extending the streets. *Id.*

11. — *Section 26, chapter 508, 1860—construction of.*] In 1860, the duties of the police justices of the city of New York having been increased, the legislature enacted that, "for the additional duties imposed by this act, the common council or board of supervisors in said city and county, may increase the compensation of any officer mentioned herein," and, under this authority, the common council, in 1862, advanced the salary of the police justices to \$5,000 a year. *Held*, that by thus advancing the salary, the authority created by the statute was exhausted, and both the common council and the board of supervisors were from that time powerless for further action in the premises; and that a resolution of the common council, passed in December, 1869, providing that their salary should be still further advanced to the rate paid to the city judge, \$10,000 a year, was void. *SMITH v. MAYOR OF N. Y.*, 56

12. — *Chapter 383, 1870, vol. 1, p. 888—Salaries of police justices.*] In 1870, the legislature enacted, that "the mayor and comptroller are hereby authorized to fix the salaries of the civil justices of said city, not exceeding the salary now paid to the police justices of said city." *Held*, that the unauthorized increase of the police justices' salaries, was not thereby legalized. *Id.*

13. — *Chapter 779, 1873—Board of estimate and apportionment created by—when its power to revise estimates of preceding board, ceases.*] The power of the board of estimate and apportionment, created by chapter 779, of the Laws of 1873, to reconsider, revise and redetermine the estimate already made for that year, ceased on the 1st day of July, 1873. *PEOPLE v. HAVEMEYER* ... 61

14. — *Section 6, article 11, chapter 335, 1873—Term of office—power of authority making appointment to prescribe—when retrospective.*] By section 9, of article 2, of chapter 137, of the Laws of 1870, the board of assistant aldermen of the city of New York, was authorized to "choose a president from its own members." *Held*, that as the duration of the office was not declared by the law, the board had power to prescribe the term for which it should be held.

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- In January, 1873, the relator was elected president of the board, by a resolution declaring him to be so elected for the year 1873. Section 6, of article 11, of chapter 335, of the Laws of 1873, after declaring that the board of aldermen and assistant aldermen shall each elect a president from its own members, in a manner therein prescribed, provides, "and when once chosen, he can be removed, before the expiration of his term as alderman or assistant alderman, only by a vote taken on a call of the ayes and noes, of four-fifths of all the members of the board." *Held*, that the relator was not thereby legislated into a term of office beyond that for which the board had chosen him, and that, upon the expiration of such term, the board was authorized to elect a president as his successor. *PEOPLE v. STRACK* 96
- *Courts take judicial cognizance of those, whereby counties, towns, etc., are created.*
See INDICTMENT, 5.
- *Foreign — Cannot for the first time be read on hearing of an appeal.*
See PROUTY v. MICH. SO. & N. IND. R. R. Co. 655
- *Relating to issue of preferred stock — construction of.*
See PROUTY v. MICH. SO. & N. IND. R. R. Co. 655
- *Removal of cause — 1 U. S. Statutes at Large, Sec. 12, Act of 1789 — Residence of National Bank, within meaning of — Entry of an appearance, within meaning of.*
See REMOVAL OF CAUSE.
- *Charter of city of Rochester — variance between charter and ordinance of common council respecting assessments — when immaterial.*
See ASSESSMENTS, 3.
- 1833, Chap. 281.
See DEFENSE, 1; PARTNERSHIP, 4.
- 1842, Chap. 157 — *when property specified in, not exempt from execution.*
See EXECUTION, 1.
- *General act for formation of manufacturing corporations — Chapter 40, 1848, §§ 12, 15 — failure to file report in accordance with — false report.*
See CORPORATION, 2.
- 1850, Chap. 172 — *Joint stock associations — when cannot set up usury as a defense.*
See DE ROE v. SMITH. 607
- 1853, Chap. 238 — *Action for partition under — when issues in, must be tried by a jury.*
See PARTITION, 1.
- 1853, Chap. 463.
See INSURANCE, 7.
- 1857, Chap. 446, § 38 — *Authority of municipal officers to make contract for public work.*
See McDONALD v. THE MAYOR, ETC. 719
- 1857, Chap. 456.
See TAXATION.
- 1860 — Chap. 348 — *Bond given by assignee under — liability of sureties on.*
See ASSIGNMENT, 2.
- 1864, Chap. 555 — *School taxes — When party has a right to appeal to Superintendent of Public Instruction under — Costs — when not allowed upon certificate made under.*
See TAXES.
- 1869, Chap. 483.
See CONSTITUTIONAL LAW, 1.
- 1869, Chap. 558 — *Mechanics' lien — Items of work — lien filed within thirty days after performance of last item.*
See MECHANICS' LIEN.

STATUTES — Continued.

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— 1869, Chap. 885, is conclusive as to value of services of supervisors, and evidence of a custom of a board to pay its members certain sums for services on committees, or to prove the value of such services, is inadmissible.
See EVIDENCE, 18.

— 1869, Chap. 217; 1870, Chap. 619 — Contract for public work under — sureties — substitution of other than those mentioned in bid, after its acceptance — when not allowed.

See CONTRACT, 5.

— 1870, Chap. 151 — Receiver of corporation — how appointed.

See RECEIVER.

— 1870, Chap. 674 — Lands in village of Edgewater — how assessed.

See ASSESSMENTS, 1, 2.

— 1872, Chap. 763 — commissioners of water-works, appointed under — village responsible for acts of.

See NEGLIGENCE, 8.

— 1873, Chap. 285 — Constitutionality of — Sec. 16, Art. 3, of the Constitution.

See CONSTITUTIONAL LAW, 3.

— 1873, Chap. 538.

See CONSTITUTIONAL LAW, 2.

— Revised Statutes, Vol. 3 [5th ed.], p. 168 — Wrong-door.

See PRINCIPAL AND AGENT, 11.

— Revised Statutes, Vol. 3 [5th ed.], p. 968, § 10. Bigamy — place of trial of — trial of, cannot be had in county, where offense was not committed, nor prisoner apprehended.

See CRIMINAL LAW, 11.

— **SEE TABLE OF STATUTES CITED.**

STATUTORY BENEFITS — Waiver of.

See CRIMINAL LAW, 7.

STAY OF PROCEEDINGS — *When court has not power to grant.*] A stay for an indefinite time, to await the result in the appellate court of an appeal in another action, because, only, of a hope that the judgment may be reversed, in whole or in part, is not within the power of the court. Such a stay simply prevents a party from asserting a legal claim, until the decision of an appeal in another action. **WARING v. YALE**..... 492

— *When undertaking, under § 384 of Code, does not of itself stay proceedings.*

See UNDERTAKING, 2.

STILLWELL ACT — Not abolished.

See STATUTES, 5.

STIPULATION — *Fraudulent — motion to set aside.*] 1. The plaintiffs applied for an order setting aside a stipulation, made in this action, vacating an order of arrest, alleging in their affidavits that their former attorney, who signed the stipulation, had no authority from either of them to make it, and that, for the purpose of obtaining thirty dollars, he willfully and corruptly stipulated away their rights herein; that there are entries in the register of defendant's attorney, showing that, on the 6th June, 1870, such attorney made an agreement with the plaintiffs' attorney to pay him thirty dollars for a stipulation to discharge the order of arrest, and that he did pay that sum on that date for said stipulation; and that plaintiffs had just been informed, by their present attorney, of the signing of the stipulation by their former attorney. The court held that the affidavit of defendant's attorney did not satisfactorily meet the charge and that the stipulation should be annulled, but without prejudice to the sheriff, who was released by the order made upon it from all responsibility. **SEAYER v. MOORE**..... 305

— *By agent in fraud of principal — When void.*

See PRINCIPAL AND AGENT.

STOCK — *Preferred* — *Dividends* — *Payment of guaranteed* — *rights of stockholders.*] When a certificate of stock provides that the stock is "entitled to dividends at the rate of ten per cent per annum, payable semi-annually out of the net earnings of said company," and is "also entitled to share pro rata with the other stock of the company, in any excess of earnings over ten per cent per annum, and the payment of dividends as aforesaid," was thereby guaranteed; *held*, that the right of the stockholders to receive this ten per cent dividend, so guaranteed, was not limited to the net earnings of the year in which it was agreed that the distribution of these net earnings should be made, but that the certificate of guarantee was, in substance, a pledge of all the future earnings of the road for the payment of this yearly ten per cent dividend.

The failure of the corporation, for want of net earnings, to make the dividends on the days when they fell due, did not relieve it from its obligation to make them when the necessary earnings should afterward be realized.

PROUTY v. MICH. SO. & N. IND. R. R. Co...... 655

— *Pledge of.*
See CONVERSION.

STOLEN GOODS — *Receiver of.*

See INDICTMENT, 1, 2.

— *Presumption arising from possession of.*
See CRIMINAL LAW, 13.

— *Statement of prisoner as to how he obtained possession of.*
See CRIMINAL LAW, 14.

— *Identity of — evidence.*
See CRIMINAL LAW, 12.

STREETS — *duties of village in repairing.*

See NEGLIGENCE, 8.

SUMMARY PROCEEDINGS.

— *Interest on rent.*
See LANDLORD AND TENANT, 4.
— *When party may be dispossessed under.*
See LANDLORD AND TENANT, 2, 3.
— *When injunction to prevent, will not be granted.*
See INJUNCTION, 2.
— *Variance in proof — when fatal.*
See LANDLORD AND TENANT, 1.

SUMMONS — *Failure to serve, on wife of mortgagor in action for foreclosure of purchase-money mortgage — Effect of.*

See FORECLOSURE, 3.

— *Publication of — when service by, unauthorized by § 135, sub. 4, of the Code.*

See GALUSHA v. FLOUR CITY NATIONAL BANK 573

— *Publication of — Court has no power to open decrees of divorce, although defendant did not receive copy summons, or notice of publication thereof.*
See DIVORCE, 1.

— *Omission to procure personal service of, or an order for publication thereof within thirty days — Effect on attachment, Code, § 227.*
See ATTACHMENT.

SUPERVISORS — *Money fraudulently obtained by, may be recovered.*] Money fraudulently obtained by a supervisor, though voluntarily paid, may be recovered back. *SUPERVISORS v. VAN CLIEF*..... 454

— *Evidence as to a custom of a board of supervisors to allow its members a certain sum for services on committees — & prove the value of such services, inadmissible.*

See EVIDENCE, 18.

SUPPLEMENTAL ANSWER — *Alleging discharge in bankruptcy — Order allowing, not appealable.*] This action was commenced in September, 1871, issue was joined in November, 1871, and an affidavit of merits served December 30, 1871. The cause was on the calendar until January Term, 1874, when an inquest was taken, and judgment entered on January sixteenth. In November, 1872, defendant instituted proceedings in bankruptcy, and, on April 18, 1873, received a discharge from all his debts, including the one for which this suit was brought. Defendant's attorneys, when advised by him of his proceedings to be discharged, understood him to instruct them that they should give the case no farther attention, and they, acting upon this, allowed the inquest to be taken. The plaintiff had notice of such proceedings. The defendant having received his discharge, and fully relying on the same as ending the suit, paid no attention to it until he learned that judgment had been entered against him, when he applied to have the judgment set aside, and for leave to file a supplemental answer, setting up his discharge. *Held*, that upon these facts, the order granting the application was proper; and *held*, further, that the order being discretionary, was not appealable.

HADLEY v. BOEHM..... 304

— *When discharge in bankruptcy may be set up by.*

See BANKRUPTCY.

— *When motion to serve, denied.*

See LACHES, 1.

SUPPLEMENTAL COMPLAINT — *Cannot be served without leave of court.*] The plaintiff in this action, four months after the service of the answer, served an amended summons and a supplemental complaint, without obtaining any leave of court, either *ex parte* or on motion. *Held*, that this should be set aside; that the right to serve a supplemental complaint is not an absolute one, but rests in the sound discretion of the court, and it cannot be served without leave of the court first obtained. SOHER v. FARGO 312

SURETY:

See PRINCIPAL AND SURETY.

SURPLUS MONEY — *Division of.*

See LIEN, 1.

— *On foreclosure sale — receipt of, by mortgagor, does not estop him from questioning validity of sale.*

See FORECLOSURE, 6.

— *Party whose mortgage is first recorded, entitled to.*

See FORECLOSURE, 4.

SURPRISE — *Ground for new trial, when.*

See NEW TRIAL, 1.

TAXATION — *Certiorari — Chapter 456, 1857 — assessment under — Vessels — registration of — legal situs of.*] For the purposes of taxation under the act of 1857, the home port of a vessel is its legal *situs*. Under the act of 1857, chapter 456, the value of the capital stock of a company determines the amount of assessment, and *not* the *locus* or *situs* of the items of property owned by the corporation. PEOPLE v. COMMISSIONERS OF TAXES..... 143

TAXES — *School taxes — seizure of property by collector of, without proper notice — remedy of party aggrieved — Chap. 555, 1864 — Costs — when not allowed.*] The defendant, McGuire, as collector, seized, under the direction of defendant Billings, the trustee of the district, certain property of the plaintiff, for non-payment of the school tax, without having posted the notices required by law. In an action brought by the plaintiff for such seizure, *held*, that the plaintiff had the right to appeal to the Superintendent of Public Instruction, under sections 1 and 2, of title 12, of chapter 555, of the Laws of 1864, and that as the judge, before whom the case was tried, certified, in pursuance of section 6, of title 13, of said chapter, that the defendant acted in good faith, the plaintiff was not entitled to costs. WHITEBECK v. BILLINGS 494

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TENANTS IN COMMON — Merger — Will — Election.] Ejectment, to recover the equal, undivided one-half of certain real estate. May 1st, 1816, Vedder conveyed a piece of land in Amsterdam, including the premises in question, to G. W. Beal and Z. Cook, who executed to him a mortgage on the same premises, which he subsequently, and on the 10th of May, 1816, assigned to G. W. Beal, Z. Cook and Sarah Beal, the mother of G. W. Beal and mother-in-law of Cook. Cook took possession of the premises. September 15th, 1827, said Cook and wife, with the knowledge of G. W. Beal, conveyed to Sarah Beal a portion of said land, including the premises in question, in consideration of \$1,800, by deed, which was recorded September 28, 1827. Sarah Beal died in January, 1828, leaving a last will and testament, duly executed, by which she devised to her son, W. H. Beal, "a piece of land in the town of Amsterdam aforesaid, called the 'wheat lot,' lately in possession of Zebulon Cook, and contains about six acres," being the premises in question, and by a codicil thereto, she revoked this devise to her son, and gave the same estate, theretofore devised to him, to his daughter, Harriet Beal, the plaintiff herein. Harriet Beal, on May 12th, 1850, conveyed one undivided half part of the wheat lot to Marcellis and Winegar, who subsequently conveyed the same to the defendant. On the 28th of August, 1835, G. W. Beal conveyed the wheat lot to David B. Corey, by quitclaim deed, which was duly recorded. David B. Corey's title was subsequently acquired by the defendant. *Held*, (1.) That, by the assignment of the mortgage, the assignees thereof became tenants in common, each being entitled to the undivided one-third part of the same; that, as Z. Cook and G. W. Beal owned the equity of redemption, two-thirds of the mortgage immediately merged in the fee, and only the one-third owned by Sarah Beal remained effectual. (2.) That, by the conveyance of Cook to Sarah Beal, she acquired title to the undivided one-half part of the wheat lot; that one-half of her interest in the mortgage became merged, and she had a lien on the other half of the lot, for one-sixth of the amount of the mortgage only. (3.) That, by her will, Harriet Beal, the plaintiff, took only such title as the testatrix had; that, if she acquired any interest in the mortgage, the statute of limitations had run against it. (4.) That the plaintiff had no title to any portion of the lot.

Sarah Beal, by her will, bequeathed to G. W. Beal a writing desk, worth twenty-five dollars, which he accepted. *Held*, that this was not a case for the application of the doctrine of election, and that G. W. Beal was not required to give up his interest in the wheat lot, as it did not appear that it was the intention of the testatrix that he should do so, and that, even if it was, it would only give the plaintiff a right to proceed against him in equity, and would not affect a *bona fide* purchaser of the property, without notice of the latent equity. *BEAL v. MILLER*..... 890

TIME — *When of the essence of a contract.*

See CONTRACT, 11, 12.

— *Of payment when not extended by taking collateral security.*

See PROMISSORY NOTE, 2.

— *Of payment of mortgage — when may be extended by parol.*

See CONTRACT, 9.

TITLE — To real estate — when acquired by possession.] 1. The referee having found as matter of fact in an ejectment suit, that, for more than forty years, the lots of the respective parties had been separated by a partition fence; that the lots had been used and cultivated by their respective owners, for more than thirty years, up to the fence, on each side; that in 1869 plaintiff's agent moved the fence two feet on to the lot occupied by defendant; that in August, 1871, defendant removed the fence to where it stood before, and brought an action and recovered damages against plaintiff for removing the fence; *held*, that it was error to find as conclusion of law, that the plaintiff was owner of the strip of land between the fence, as it originally stood, and as it stood after its removal by plaintiff. *DU FORT v. CONROY*..... 608

— *To lands of partnership, taken in name of one partner.*

See PARTNERSHIP, 7.

— *To personal property, staked on a wager — when does it pass to bona fide purchaser.*

See WAGER.

TITLE—*Continued.*

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— *To property acquired under foreign bankrupt laws — when courts of this State will not recognize or enforce.*

See FOREIGN LAWS.

— *To property, when it does not vest in purchaser under conditional delivery*

See CONDITIONAL SALE.

TOWN BONDS—*Bona fide purchaser of—when their invalidity cannot be set up as a defense against.*] 1. Town bonds, payable to bearer, and which appear on their face to be issued in pursuance of the express authority of the legislature, are not, when in the hands of a *bona fide* purchaser for value, open to any defense in respect to their validity.

MARSH v. TOWN OF LITTLE VALLEY..... 554

2. — *Holder of, may maintain action at law against town.*] The holder of bonds payable to bearer, and which appear on their face to have been issued by express authority of the legislature, may maintain an action at law against the town, and he is not compelled to resort to mandamus. *Id.*

3. — *Bona fide purchaser of—effect of repeal of act authorizing the issue of.*] The rights of a *bona fide* purchaser of such bonds, cannot be taken away or affected by the subsequent repeal of the act under which they were issued. *Id.*

— *Invalid—Payment of—may be enforced by legislation.*

See CONSTITUTIONAL LAW, 1.

TOWNS—*Action at law will lie against, for the recovery of admitted debts, resting on bond, or other adjusted obligation.*] No action at law will lie against a town in respect to all that class of claims, accounts or demands, which come within the scope of the powers and duties, conferred upon the board of town auditors, to examine, settle, adjust and allow; certainly not until they become fixed, recognized and admitted debts. But this rule does not apply to settled and admitted debts, resting on bond, or upon other adjusted admission or obligation, binding on the town. MARSH v. TOWN OF LITTLE VALLEY..... 554

TRADE-MARK—*Right to the exclusive use of family name as—Injunction to prevent use of family name as—denied except in case of fraud or deceit—Distinction between bequest of good-will of business and exclusive use of name as.*] In 1826, Andrew Meneely, the father of the plaintiffs, and the defendant Meneely, commenced the business of bell making at West Troy, and continued therein until 1851, when the plaintiff, E. A. Meneely, became his partner, and so continued until his father's death in October, 1851, after which, the business was carried on by the plaintiffs. By reason of the skill of A. Meneely and his successors, the bell foundry had acquired a great reputation, the business having been carried on under the names of "Andrew Meneely," "Andrew Meneely & Son," "Andrew Meneely's Sons," and "E. A. & G. R. Meneely." In 1872, the defendants commenced bell making at Troy, under the name of "Meneely & Kimberly," and issued catalogues, resembling in most, but not in all respects, those issued by the plaintiffs. The defendants, by the use of the name "Meneely," expected and intended to derive a profit and advantage from the good reputation and celebrity in bell founding, given to that name by A. Meneely and the plaintiffs, and the use thereof by them is calculated to do so, and does mislead persons not personally acquainted with plaintiffs and defendants, and with the respective locations of Troy and West Troy, and is injurious to the plaintiffs' business. *Held*, that the plaintiffs were not entitled to an injunction restraining the defendants from using the name "Meneely" in the business of bell founding at Troy. Under such circumstances, a court of equity will not interfere to prevent the use of a family name, in the pursuit of a lawful business, except where there has been fraud or deceit practiced, or where some false or fraudulent device has been employed to injure and interfere with the business of another, and impose upon the public. The cases upon this subject examined and distinguished.

Andrew Meneely, by his will, after making certain specific legacies, devised all the remainder of his estate, both real and personal, to the plaintiffs, charging them with the support and maintenance of his children during the minority of the youngest of them, and with the payment of certain legacies, and he states that in so doing, he has taken into view "that I leave them * * * conveniences for carrying on a successful business * * *

TRADE-MARK — *Continued.*

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and the good-will and custom which it is believed is established and connected with it." *Held*, (1), that there is a distinction between appropriating the good-will of a business of a deceased father, carried on in a particular locality, and enjoying the benefit of his name and reputation as a man of skill and fair dealing; (2), that there was nothing in the language of the will, which conferred upon the plaintiffs the exclusive use of the name of Meneely in the business of bell founding. *MENEELY v. MENEELY*..... 867

TRESPASS — *On lands of railroad company — Duty of company toward trespasser.*

See RAILROAD COMPANY, 1.

TRUSTEES OF CORPORATIONS — *Cause of action given by statute to creditors of corporation against — assignable.*

See CORPORATION, 3.

— *Of manufacturing corporation — failure of to file report.*

See CORPORATION, 2.

TRUSTS — *Suspension of power of alienation — Accumulation.*

See WILL, 2, 3.

— *Passive trust — a mere passive trust to hold property for another's use, cannot exist under the laws of this State.*

See ASSIGNMENT, 1.

— *When they arise by implication of law — What, not affected by statute of uses and trusts — When conveyance by trustee to cestui que trust, fraudulent as to creditors.*

See STATUTE OF USES AND TRUSTS.

ULTRA VIRES — *Acts of officer of corporation, when.]* 1. It cannot be inferred from the simple fact that a person is the president of a corporation, that he has authority to contract on its behalf.

RISLEY v. IND., B. & W. R. R. Co...... 203

2. — *Ratification.]* Before one act can be accepted as the ratification or confirmation of another, the party acting must have some knowledge or information, at least, of its existence. *Id.*

3. — *President of corporation taking assignment of contract made by it — effect.]* A president of a corporation, taking an assignment of a contract, theretofore entered into between the corporation and a contractor for constructing its road, etc., acts as trustee of the corporation and its stockholders, and not as the contractor's assignee. *Id.*

UNDERTAKING — *On appeal — liability under — Extra allowance in original action, recoverable in action on.]* 1. The plaintiff brought an action against one Hathorn, which resulted in a verdict for the defendant. Plaintiff appealed to the General Term, where a new trial was granted. Upon an appeal from the order of the General Term, granting the new trial, the defendant and another executed an undertaking, which provided, 1st. For the payment of all costs and damages which might be awarded against the appellant on said appeal, not exceeding \$500; 2d. For the amount directed to be paid, if the judgment appealed from, or any part thereof, should be affirmed; and, 3d. For the payment of all damages and costs which should be awarded against the appellant on said appeal. The Court of Appeals affirmed the order of the General Term, and ordered judgment absolute for the plaintiff.

Held, that the first part of the undertaking restricted the amount, secured by it, to a sum certain, which is specified; that the second was entirely inapplicable to the order appealed from, and should be considered stricken out as surplusage; that the third part was unrestricted in its terms, and, fairly interpreted, was broad and comprehensive enough to embrace all costs and damages which might finally be awarded against the appellant, and necessarily included the full amount of the judgment awarded by the Court of Appeals.

As the action of the plaintiff in accepting the undertaking in suit instead of proceeding with the case, was for the benefit of the appellant, who was thereby relieved from the necessity of making a motion to the court, it was *held*, that this furnished a sufficient consideration to support the undertaking.

UNDERTAKING — *Continued.*

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At the time of entering the judgment in the original action, an extra allowance was granted to the plaintiff. *Held*, that he was entitled to recover the same from the defendant in this action. *Post v. DOREMUS*..... 531

2. — *On appeal* — *What does not of itself stay proceedings in court below.*] The undertaking required to be given by section 884 of the Code, does not of itself stay the proceedings in the court below; and the only way in which they can be stayed, after an order for a new trial has been made, is by a motion directly to the court for that purpose, where the proper terms can be imposed as to security. *Id.*

3. — *On appeal* — *What costs, held not included in, in action on.*] At the same time that the appeal was taken from the order granting a new trial, appeals were taken from two other orders in the action. *Held*, that the costs of those appeals were not included in the undertaking. *Id.*

UNITED STATES COURTS — *Entering of appearance which authorizes removal of causes to.*

See REMOVAL OF CAUSE.

USE AND OCCUPATION — *When person liable for.*

See LEASE, 3.

USES AND TRUSTS — *What trusts not affected by statute of.*

See STATUTE OF USES AND TRUST.

USURY — *Defense of, in action on notes* — *Plaintiff allowed to recover when ignorant of usurious agreement between maker and person who procured discount.*

See PROMISSORY NOTE, 3.

— *Sureties of corporation may not set up defense of.*

See BILLS OF EXCHANGE.

— *Joint stock associations* — *when precluded from setting up, as a defense* — Chap. 172, 1850.

See DE ROE v. SMITH 607

— *Cannot be interposed as defense by sureties on draft drawn by corporation.*

See BILLS OF EXCHANGE.

— *Draft* — *Discount of, at rate lawful where drawn, but usurious in this State* — *effect of.*

See BILLS OF EXCHANGE.

— *Usurious loan* — *Sale of collaterals* — *when restrained.*

See INJUNCTION, 3.

VENUE — *Code, sections 125, 126.*] In this case, an application was made to change the venue, from the city and county of New York, to the county of Suffolk. The defendant, Mellen, resided in the city of New York, and the defendant, Collins, who alone appeared and served an answer, resided in Suffolk county, the plaintiff and the remaining defendant being non-residents. *Held*, that the venue was properly laid; that the plaintiff had, under section 125 of the Code, the option of selecting the place of trial, as between the two defendants, and that the fact that Collins was the only defendant who appeared in the action, did not affect the question. The statute does not distinguish between those who appear and those who do not.

FOREHAND v. COLLINS 316

VENDOR AND VENDEE — *Lien of vendor for purchase-money.*

See SPECIFIC PERFORMANCE, 2.

VERDICT — *When court cannot reduce, because it is deemed excessive.*

See DAMAGES, 3.

VESSELS — *Lien for materials furnished.*

See LIEN, 2.

— *See* SHIPS AND VESSELS.

VESTED REMAINDER — *When created.*

See PARTITION, 2

VIRGINITY — *Of person ravished — immateriality of.*

P. 68.

See RAPE, 1.

WAGER — *Property staked on a bet — when title to, does not pass -- bona fide purchaser of.]* One Smith fraudulently induced the plaintiff to stake his watch and chain upon a bet made with him, which bet the plaintiff lost through the fraud and deceit of Smith and his confederates. The watch and chain were delivered to Smith by the stakeholder, and subsequently purchased by the defendant. In an action brought by the plaintiff to recover the watch and chain, *held*, that he was entitled to recover; that by the delivery of the watch and chain to the stakeholder, the plaintiff did not intend to part with his property in them; that no authority was conferred upon the stakeholder to deliver the property to Smith, unless the bet was fairly won by the latter; and that defendant acquired no better title than that possessed by his vendor.

HODGE v. SEXTON 576

WAIVER — *Giving bail is not, of right to make motion to vacate order of arrest by fugitive surrendered under extradition treaty.*

See EXTRADITION TREATY, 8.

WAREHOUSEMAN — *Liability of, for charges on freight stored with him by common carrier, in case of unauthorized delivery of it by him to consignee.]* A warehouseman, with whom freight, on which the charge for transportation is unpaid, is stored by a common carrier, and who, without the knowledge or consent of the common carrier, delivers the property to the consignee, is liable to the common carrier for the amount of his charges.

COMPTON v. SHAW 441

— *Common carrier — when he holds property as.*

See COMMON CARRIER.

WAREHOUSE RECEIPT — *Fraudulent sale — Rights of bona fide purchasers.]* Where a warehouseman gives a receipt for property fraudulently purchased, some of which, at the time of giving the receipt, has not been, but subsequently is received by him, a person, making advances to the fraudulent purchaser on the strength of the receipt, without notice of any fact calculated to awaken suspicion, and to whom it is transferred, is entitled to hold so much of the property as was in the warehouse at the time the advances were made. McCOMBLE v. SPADER 198

WILL — *Remainder — when vested.]* 1. James Hayes died in 1828, leaving a will, by which he directed his executors to turn his estate into money, invest the same, and apply the income thereof to the support and maintenance of his wife and children. Then follows the following provision: "I will, devise and bequeath unto my said children, William, Mary and James, all my estate, both real and personal, of all kinds whatsoever, to be equally divided between them, share and share alike, upon the event of the death of their mother, my said wife." *Held*, that the children took vested remainders immediately upon the death of the testator. HAYS v. GOURLEY 88

2. — *Trust — Suspension of power of alienation.]* Where the testator, having devised property, both real and personal, to trustees, to receive the rents, issues and profits thereof, divided the same into fourteen equal parts, and directed that the rents, profits and income of each part should be paid over to different persons named in the will, the trust, as to each part, to terminate upon the expiration of two lives in being at the time of the testator's death, *held*, that the fact that the due execution of the trust would require some of the parts to remain in the hands of the trustees after the trust had terminated, and the ultimate right vested, as to them, did not invalidate the trust by creating an unlawful suspension of the power of alienation. MESEROLE v. MESEROLE... 66

3. — *Accumulation.]* The testator directed that a portion of the rents, incomes and profits of certain of the shares, which were given to the minors, should be accumulated during their respective minorities, and, upon their expiration, the accumulation of each share should be added thereto, and the rents, incomes and profits of the shares, thus augmented, paid over to the respective beneficiaries. *Held*, that the direction was valid; that the law does not require the accumulation to be paid over to the beneficiary upon the

WILL — Continued.

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termination of his minority; and that it is sufficient if it be for his benefit. *Id.*

4. — *Construction of — action for — by whom brought.*] Whether or not the heir-at-law can maintain an action for the purpose of procuring a construction of the testator's will, *quere*.

Semble. That the right to maintain such an action in equity, is limited to the executors or trustees themselves, and the persons specially authorized to do so, under the act of 1853. *Id.*

5. — *Intention — words must give way to — Legatees taking as a class or as individuals.*] Where the general scheme of a will shows that the testator intended to treat certain legatees as a class, the fact that the several legatees are specially named in the bequest, and that the gift is to them "*in equal proportions, share and share alike,*" will not have the effect of preventing the intention, to treat them as a class, from prevailing. *HOPPOCK v. TUCKER*... 183

6. — *Construction of — Remainder — when vested.*] Susan Hopkins died, leaving a will, by which she devised the use and income of all her estate, both real and personal, to two of her daughters, so long as they should live and remain unmarried, and, upon their death or marriage, she devised all the rest, residue and remainder of her estate to her children, naming them, or to the survivor or survivors of them; and, "in case any of my children die, having issue, then I will and direct that the child or children of such son or daughter of mine shall receive the same as the parent of such grandchild would have received, if living." *Held*, that the children named in the will took vested estates in remainder immediately upon the death of the testatrix. *HOPKINS v. HOPKINS*..... 353

7. — *Realty — when proceeds of sale of real estate in partition will be considered as.* *Distinction between effect of sale under will and sale in partition.*] An interest in certain real estate was devised to one R. for life, with remainder over to her children. While the children were still infants, the real estate was sold under a decree in a suit for partition, instituted by one of the other tenants in common. *Held*, that the estate of the infants was not changed by the sale, and that their interest in the proceeds was to be regarded as realty, and not as personalty.

Distinction drawn between the effect of a sale under the provisions of a will and a sale had under a decree in partition. *IN MATTER OF THOMAS* ... 473

8. — *Residuary legatees — no interest in estate until prior legatees have been paid.*] The defendant's testator devised all his estate, both real and personal, to trustees, to apply certain portions of the rents, issues and profits thereof to the use of persons, named in his will, during the life of his wife; and directed that, upon her death, the residue of the estate should, after the payment of certain specific legacies, be divided between the plaintiffs' assignors. A portion of the rents being undisposed of by the will, the plaintiffs applied to have the accumulation paid over to them. *Held*, that they were not entitled to receive it; that it did not appear that upon the division of the estate and the payment of the specific legacies, there would be any residue to which the plaintiffs would be entitled. *HUTCHINS v. MERRILL*..... 476

9. — *Construction of — Suspension of power of alienation — Accumulation — provision for — when void.*] The ninth clause of the will of the plaintiff's testator, was as follows: "I further bequeath to my children, after paying all the above legacies and my just debts, all interest that may accrue on the balance of my estate, to be divided between them at the age of forty years, to hold for their natural lives and then to be divided between their heirs." *Held*, that the provision for the accumulation of the income of the estate was void, as it extended beyond the minority of the children; and *held further*, that the provision could not be held void in so far as it required the accumulation to extend beyond the minorities of the respective children, and effect be given to the residue, for the reason that it provided for a suspension of the power of alienation for more than two lives in being at the time of the creation of the estate. *SIMPSON v. ENGLISH*..... 559

10. — *The word "heirs" — distinction between the meaning of, when used in devises, and when used in bequests.*] When land is devised to a person and his heirs, or to the heirs of a person named, the word "heirs" must be

WILL — Continued.

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construed to embrace those only who are heirs in the strict, legal sense of the term ; unless there is something in the will to show that it was used in a contrary sense.

In a bequest of personal property, the word "heirs" may be construed to mean children, or next of kin. *CUSHMAN v. HORTON*..... 601

— *Bequest of good-will of business not bequest of exclusive use of testator's family name as trade-mark.*

See TRADE-MARK.

— *Election.*

See TENANTS IN COMMON.

— *Vested remainder — when created by.*

See PARTITION, 2.



WITNESS — *What evidence not allowed, to impair statement of.* 1. This action was brought against the defendant, as indorser of a promissory note. The defense was, that the indorsement was a forgery. At the trial, the defendant offered to prove that a witness, called by the plaintiff, had been instrumental in getting one Bell indicted for the forgery of the note in suit, claiming that such evidence was admissible on the ground, that, if he was so instrumental, it militated against and impaired his opinion, previously given in evidence, that the indorsement was genuine. *Held*, that the evidence was properly excluded. He might have doubted whether the defendant would swear before the grand jury that the indorsement was not his, and might have desired to put him to the test of his oath ; and, with a view to try the defendant's sincerity, in his assertion that his name on the note was a forgery, he might have aided in procuring his attendance before the grand jury, and thus have been, in fact, instrumental in obtaining the indictment, notwithstanding his settled conviction and full belief that the indorsement was genuine.

MARKS v. KING..... 425

2. — *Ex parte examination of, before referee — adverse party cannot interfere to prevent — appearance of witness — when waiver of objection to regularity of papers.* A party cannot interfere to prevent the procuring of an *ex parte* affidavit by his adversary. Objections to the contents of the affidavit, or to the mode of procuring it, must be made when the affidavit is sought to be used. The witness having appeared, and having submitted to the examination without objection, *held*, that it was afterward too late for him to initiate proceedings to set aside the order, on the ground of the insufficiency of the affidavit on which it was granted. *MCCUE v. TRIBUNE ASSOCIATION*..... 469

— *Letter of, inconsistent with statements made on trial, admissible in evidence.*

See EVIDENCE, 15.

— *Statement of person to whom witness has been referred by plaintiff for information — when admissible.*

See EVIDENCE, 26.

— *Letters of, in conflict with his statements — when admissible, though witness not given opportunity to explain them.*

See EVIDENCE, 24.

— *Commission rogatory — when issued.*

See COMMISSION ROGATORY.

WRIT OF ERROR. A writ of error brings before the court only the record and exceptions taken, and it is not competent for it to weigh the evidence, or pass upon the correctness of the verdict of the jury.

WOOD v. PEOPLE..... 881

2. — *Motion to dismiss — Fugitive from justice.* A writ of error allowed after judgment, and before the escape of a prisoner, will not be quashed on motion of the people, though it appear that after the allowance of such writ, the prisoner escaped and fled the jurisdiction of the court.

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WRITTEN INSTRUMENT — *Object of, may be shown by parol.*

See EVIDENCE, 4.





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